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PROOFS IN THE OUTER HOUSE.

THE Evidence Act of last Session has now been in operation for six weeks, and a considerable number of proofs have been taken under its provisions. But as few judgments on evidence have become known, and as none have come before the Inner House for review, the remarks which we hazard must be taken for the most part as tentative or suggestive, rather than as expressions of fully formed opinion. Upon the whole, the Act has given satisfaction, although it cannot be said that it is yet in thorough working order. Neither judges, counsel, nor agents are yet familiar with the course of procedure under it; and some important points of practice, which arise in almost every trial, not only are still unsettled, but have given occasion to difference of opinion, and, unless a remedy is applied, may lead to serious diversity of practice at the various bars. We refer especially to the time when counsel are to speak on the proof, and the mode in which documentary evidence is to be recovered and put in. It was very early intimated by at least one Lord Ordinary, and it was supposed to be the wish of all, that the debate should follow the conclusion of the proof without any delay. Whatever the theory on this matter may be, the practice undoubtedly has been to allow an interval to elapse. No doubt there is the excuse of novelty, which should now be wearing off; and it was said that there were exceptional circumstances in some of the cases, but it can hardly be that all the score of cases which have been thus tried were of an exceptional character. There is, we rather think, a growing inclination to allow a short interval, of one or perhaps two nights, between the examination of witnesses and the debate on evidence. There

is no jury of twelve whom it would be inconvenient to detain or to bring back; and, provided the delay is not so long as to destroy the freshness of the impression left by the oral testimony, it would probably conduce to the ascertainment of the truth and justice of the case if the expected Act of Sederunt allowed an interval, but limited it to four days. The same clause might regulate the number of speeches. It would surely be sufficient that the Lord Ordinary, fresh from the evidence, should hear only senior counsel. The Inner House of course can hardly in more serious cases be expected to dispense with an opening by the juniors on each side.

The question as to recovering documentary evidence is still more important. It has been the general impression, resting not only on the terms of the statute, but also on high authority (notwithstanding one judgment of a Lord Ordinary to the contrary), that it is not competent to examine havers on commission under the Conjugal Rights Act. There can be no doubt as to its competency under the 2d section of the new Act; but we submit that there can be as little doubt, in a large class of cases, as to its inexpediency. Lord Barcaple has intimated his opinion that the Lord Ordinary's time should not be taken up with the examination of havers. Lord Ormidale, on the other hand, questions the propriety of the expensive commission and diligence for examination of havers. We entirely sympathize with Lord Barcaple as to the impropriety of taking up the judge's time with tedious and unimportant examinations of havers; more especially as the examination before him of the ordinary witnesses *in causa* is already a considerable addition to his labours. But there are two classes of cases to be distinguished. Where any considerable amount of documentary evidence is adduced, it would certainly be a mere waste of public time for the Lord Ordinary to sit, as was the case in *Udny* v. *Udny*, for four or five mortal hours, wearily gazing at the counsel for the parties getting up old letters from havers. In such cases, by all means let us have a commissioner. But it may be worth considering whether the expense and trouble of a separate citation and compearance of witnesses and separate attendance of counsel and agents, might not be saved by holding the meeting before the commissioner at nine o'clock on the morning of the trial, or, in particularly heavy cases, on the day before. In another class of cases, however, the examination of havers may be got through in a few minutes, and if, as it

often happens, the havers are also witnesses in the cause, it would be a waste of more than time to have two examinations of the same persons at two different diets. It may be said that the mere service of the specification, or at least the granting of the diligence, is sufficient in many cases to make the documents forthcoming; and that few diligences are actually executed. This is quite true in a number of instances, but in any view there will be a saving of expense in the method suggested. The difficulty is how to distinguish between these cases. The Lord Ordinary, in the interlocutor fixing the trial, ought not to grant diligence for the citation of havers to the trial, except upon special motion; and before granting it, he should be entitled to require from the counsel an assurance, on his personal responsibility, that no considerable time would be occupied in the recovery of documents. It is probable that the introduction of such a practice as this might lead to the discontinuance to some extent of the present expensive and not always satisfactory system of diligences preparatory to jury trials. In England, it is well known, no such preparatory diligences are in use; and although there are deficiences and anomalies in the English system which we have no desire to transplant to Scotland, and although, on the other hand, the Scottish preparatory diligence affords means of attaining justice which we should be sorry altogether to forego, it would probably be found on examination that both countries might here, as in other departments of the law, advantageously borrow from each other. At the risk of digression, let us glance for a moment at the English practice in this matter.

In England, when a litigant means to found on documents in the possession of the opposite party, he merely gives him "notice to produce" them. If this be disregarded the effect is twofold; secondary evidence of the contents of the documents is admitted, and the party in whose hands they are is precluded from producing them, or from leading proof to rebut the secondary evidence which has thus been admitted. It would probably be a subject for regret if this rule should be introduced in Scotland in its entirety. Secondary evidence may not always be accessible, and where such is the case the power of enforcing production, which the Scotch diligence against havers confers, seems necessary, especially in the absence of a jury, to prevent a failure of justice. Moreover, it might be absurd, under the improved law of evidence which we now possess, to introduce what is really a remnant

of the exploded principle, that a party is not compellable to give evidence against himself, lingering on in the practice of English courts merely because there was once a reason for its existence. It might be wise, however, to give "notice to produce," and make the party failing to comply, liable to the expense of afterwards recovering the documents from him, if for special reasons the Court should grant a diligence. Perhaps also there might be introduced into our practice the "notice to admit," which throws the expense of proving writings or productions on the opposite party declining to give the required admissions. It is remarkable that in England this penalty is almost never incurred. If the documents are in the hands of a third party, he is served with a *subpœna duces tecum*, which is just a citation as a haver. In practice, however, the *subpœna duces tecum* is generally introduced into the ordinary *subpœna ad testificandum*. It is not generally supposed that any material disadvantages arise from the practice of the English law in this respect, although no doubt Scottish agents and counsel might at first feel somewhat uncomfortable at the idea of not seeing the documents relied on until the trial. That is so, however (*si parva licet componere magnis*), in every case in the Sheriff's Registration Court, and an expert agent often picks out a flaw in a title in the few minutes allowed for examination. Besides, for some "special cause," the Court should have power to give a party the means of examining documents beforehand, as at present. An attempt, however, to apply the rules of the English law, beyond what occurs as natural and expedient in the new form of proof, would be difficult and hazardous. Any endeavour to borrow one portion of a living system of jurisprudence, and insert it in another, must be so. That which has grown up in England in the course of centuries may not thrive in Scotland; and our reference to English practice is chiefly designed to induce our law reformers to look a little deeper into the jurisprudence of the sister country, not for patterns to be servilely copied, but for suggestions which they may manfully and independently work out and adapt.

Some practitioners have charged the new form of taking proofs with a defect which an Act of Sederunt could not, we believe, competently remedy. In taking proofs by commission an important addition is often made, or a serious error corrected, while the evidence taken down by the clerk is being read over to the witness; and it is said that the evidence taken before the Lord Ordi-

nary ought to be read over to each witness by the shorthand writer for two or perhaps for three purposes—*first*, as a check or aid to his own accuracy; *second*, as a means of getting at the exact and complete truth of the matter; and, *third*, to fix the facts more thoroughly in the memory of the counsel who is to speak on the case immediately, without the use of the shorthand notes. Although, in our former article on this Act (November 1866), we suggested that reading over the evidence might well have been dispensed with in the cases in which the Act still requires it, we admit that two of these considerations deserve attention. The exuberant confidence deservedly placed by all in the gentleman who has for many years ably fulfilled this responsible and laborious duty in most of the proceedings in the Court of Session, has prevented people from ever thinking of the need of a check or an aid to the accuracy of the shorthand writer. It is possible, however, that the suggestion we have indicated will press itself more and more on the minds of practitioners, as, in the great increase of this kind of business, they find that that gentleman cannot be in two places at once, and still more so, as they find the difficulty of obtaining a really reliable verbatim reporter of legal proceedings. It should be remembered, however, that the new form of proof differs from proof by commission in this material respect, that the judge who is in the first instance to decide on the evidence, hears it and sees the witnesses, and would probably not be precluded from correcting the notes *ex intervallo* with the co-operation of the shorthand writer (cf. *Morrison* v. *Maclean's Trs.*, May 8, 1865, 3 Macph., H. of L., 42). The Lord Ordinary may be a sufficient check on the accuracy of the shorthand writer, and it will always be in his power, where any doubt exists as to the competency of the shorthand writer, to dictate the evidence to him as expressly provided by the Act. The second reason assigned for having the evidence read over is also a material one, though we fear that it would tend to encumber the proof with explanations. The third, we imagine, will not be regarded by most counsel as possessing any weight. Upon the whole, it seems almost certain that the difficulty of rapidly reading over the evidence from unextended shorthand notes—a very serious difficulty even to those most proficient in the art—is enough to prevent this suggestion from being carried out in practice. And it would certainly defeat one purpose of the Act

of Parliament by adding materially—probably two hours *per diem*—to the length of the proceedings.

A most serious consideration, under the new system of taking proofs, is the condition of the Courts. It will be absolutely necessary to find some decent accommodation for witnesses within reach of the Ordinaries' bars. But this grievance is a trifle compared with the want of fit accommodation for the Court itself. Most people have long given up hoping for any improvement in the system of heating and ventilating the Outer House and the Court-rooms; but the atmosphere, which exhausts the strength of the strong man who spends a day at a proof in one of the little boxes called by courtesy the Lords Ordinaries' Courts, and the smell of humanity and gas which meets the visitor who enters at any time after mid-day, urgently call for a remedy. It has been suggested —we know not by whom—that the passage behind the Outer House Bars might be dispensed with, and a considerable space might thus be added to the court-rooms. We commend this suggestion to the intelligent consideration of Mr Mathieson.

In conclusion, we summarize the matters with which it appears that an Act of Sederunt may fairly deal. It should—

1. Specify the grounds on which diets of proof may be adjourned. (See *Journ. of Jur.*, Nov. 1866, p. 319, sqq.)

2 Provide as to appeals upon the admission or rejection of evidence, and as to the competency of "sealing up" (*ibid*).

3. Provide that the Lord Ordinary's judgment on proof shall always separate fact and law (*ibid*).

4. Provide as to the time when counsel shall speak, and as to the number and order of speeches.

5. Lay down general rules to guide the discretion of Lords Ordinary in regard to the recovery of documentary evidence.

SHERIFF COURT PROCESS.

[SOME of the views expressed in the following article differ from those which have generally been advocated in this *Journal, e.g.*, as to the prohibition of appeals from the Small Debt Court upon points of law. But our duty is not merely to maintain a certain set of views. It is rather to afford the means of enlightened

discussion, and to reflect, so far as we can, the opinions of large sections of the legal profession. The article was in type before the Lord Advocate's intention to introduce extensive measures of law reform, including a reform of Sheriff Court procedure, was formally announced.]

The statute at present regulating the form of process in the Sheriff Courts was the result of much discussion, as to the best mode of rendering the recovery of debts more speedy and less expensive. Many supposed that the remedy for all the expense and delay complained of in ordinary actions, was to be found in an extension of the Small Debt jurisdiction; and they founded their weightiest arguments on the success of the Small Debt Courts with a jurisdiction extending to £8, 6s. 8d., and on the successful working of the County Courts in England, with a jurisdiction extending to £50, admittedly instituted on the model of the Small Debt Courts of Scotland. The views of those who advocated an increase of the Small Debt jurisdiction were, to a certain extent, given effect to; and in 1853 by the statute 16 and 17 Vict. cap. 80, while the form of process in ordinary actions was much altered and many improvements introduced, the Small Debt jurisdiction was extended to £12.

After thirteen years' experience of the working of that statute, the unanimous opinion of the public and the profession is that the alterations introduced by it have been improvements on the former practice. We may now call the attention of our readers to the consideration of the subject, with the view of pointing out some further changes which experience has suggested as likely to increase the usefulness of the Sheriff Courts. This seems to be a peculiarly fitting time for doing so, as commercial bodies have been bestirring themselves in order to obtain some further reform in Sheriff Court legislation; and it has been stated that the Lord Advocate is preparing a measure introducing considerable alterations on the present practice.

In dealing with ordinary actions, the Sheriff Court Act introduced a much shorter form of summons, and a new mode of making up records by a minute of defence. The mode of recording oral evidence was entirely changed; oral pleadings were introduced, and an almost entirely new form of procedure instituted for obtaining the judgment of the Sheriff on appeal.

The most serious objection to the provisions regarding ordinary actions is that there is no cheap and speedy mode of conducting

a process in which the sum in dispute is of small amount. The same rules of procedure are applicable to all ordinary actions, whatever the amount concluded for. There is some difference in the charges sanctioned by the table of fees for causes under £25, under £100 and above £100, respectively; but the form of process being the same, and the trouble to the agent consequently the same whatever the value in dispute, the difference in the scales of charges is necessarily small. In any case where the sum in dispute exceeds £12, there may be condescendence and defences, and revisals perhaps on separate papers, an oral debate, a proof, and a debate on the import of the proof while the case is before the Sheriff-Substitute; and on appeal to the Sheriff, a reclaiming petition and answers—just as much writing and argument as may be about a case where twenty times the amount is concluded for. In a case under £25, the losing party may have to pay a sum of expenses equal to, if not exceeding, the sum in dispute. Some strong measure is surely required to prevent such an abuse,—an abuse that gives the greatest offence to the respectable practitioner. In our remarks on the different steps of procedure in an ordinary action, we shall point out some alterations in the form of process whereby in ordinary actions for small sums the form of process may with safety be shortened, the expense of litigation diminished, and also, as a necessary result, delay avoided.

The shorter form of summons has been found to be free from objection in practice. It gives all the information necessary to bring a cause into Court, or necessary where the defender allows decree to pass against him in absence. The cost of framing the summons is, in cases for small amount, the only objection to it. A charge of 15s. for drafting the summons, is a high charge where the sum sued for is £15 or £16. In undefended cases this charge, along with others, makes the cost of obtaining a decree amount to a sum never less than £1 15s.; by a very great deal too large a sum of expenses for obtaining a decree in absence for less than £25. In a large class of cases, the Small Debt form of summons might be usefully introduced,—perhaps in all where the sum sued for does not exceed £50. That form of summons, with the written claim lodged along with it gives all the information necessary to bring a cause into Court. More care would be required, and of course would be bestowed by agents, in preparing the claim or statement of the grounds of action, served along with

a summons that may be the foundation of an ordinary action, than is perhaps at present bestowed on the preparation of Small Debt claims by the parties, even with the aid (in most cases where aid is had) of the Sheriff Officer employed to serve the summons. In undefended causes, the expense of obtaining decree in absence might be reduced, by granting decree in the Small Debt Court, where a decree in absence rarely costs above 5s. Where defenders appear and state a defence, all cases above the Small Debt ordinary jurisdiction might be at once put to the ordinary roll, and further proceeded in as ordinary actions. That actions commencing with a Small Debt summons should be litigated in the form applicable to ordinary actions is no new proposition. The Small Debt Act of 1837 (1 Vict. c. 41 § 14) made special provision for cases under £8 6s. 8d. originating in the Small Debt Court, being, by order of the Sheriff, carried on under the same rules of procedure as apply to ordinary actions, when recourse to that form of procedure was found to be necessary, "in consequence of any difficulty in point of law, or special circumstances of any particular case." It would be no very serious change on such a provision to make the Small Debt jurisdiction extend to all cases under £50, with this reservation, that whenever the amount sued for exceeds the sum to which the Small Debt jurisdiction extends in litigated causes, if a minute of defence is lodged, or the defender appears and objects to decree, the case shall be remitted at once to the roll of ordinary actions, parties heard on the grounds of action, and the nature of the defence, and the case thereafter proceeded with as an ordinary action. At present, cases are often so remitted from the Small Debt Court to the ordinary court, where questions of difficulty occur, or where questions are raised as to local or burgh taxes, rights to levy tolls and the like. No difficulty ever arises from the summons being in the Small Debt form, as parties state the facts and pleas on which they found in condescendence and defences. Thus the parties have, if they desire it, an opportunity of obtaining not only the judgment of the Sheriff-Substitute, but also that of the Sheriff.

In actions for large amounts the form of the summons is short enough and cheap enough, keeping in view the necessity of fairly rewarding professional services, and making the fee chargeable bear some proportion to the amount of responsibility resting on an agent in conducting litigation, where large sums are at stake.

When appearance is entered to defend an action the cause goes to the roll and parties are heard "in explanation of the grounds of action and the nature of the defence." The manner in which the record is to be made up is then determined on. If it is a suitable form for the case as stated at the bar, the record is made up on a minute of the defence stated. This is the most expeditious and necessarily the cheapest form of record; but in many cases it is inapplicable, very often because there is no opportunity of making any statement of the pursuer's case in addition to what is contained in the conclusions of the summons. It may be hard on one or possibly on both parties to compel them to close the record on a minute of defence. The only other course is to order condescendence and defences. These papers have generally to be revised, often on separate papers, and then there must be a meeting with the Sheriff-Substitute to adjust and close the record. The expense of such a record is great; but the consequent delay is still more serious. The Sheriff Court Act makes very stringent provisions for enforcing despatch and insuring punctuality in the lodging of papers; but who that has ever had anything to do with Sheriff Court practice does not know how the lodging of papers is delayed, how many are lodged of consent long after they are due, and how averse agents are to take decree by default? Moreover, it is not always in the most important cases that the time occupied in the preparation of the record is greatest. Written papers are at present necessary and unavoidable in a large class of cases, in which the necessity for them might easily be obviated. Take, for example, filiation cases. The summons states the name of the mother, the party alleged to be the father, the date and place of the birth of the child, and the sum of aliment and inlying charges sued for. That is a statement on which it would be manifestly unfair to the defender to compel him to go to proof, especially as it is now the rule that the defender's proof must proceed immediately on the close of the pursuer's. He may thereby be deprived of the opportunity of bringing evidence to meet the pursuer's proof. He may be cut out of his best defence where he can prove an *alibi*. He cannot be prepared to meet proof that he has been with the pursuer at times and places of which he has no information; and there are obvious objections to an adjournment of proof. Were there a provision for a minute by the pursuer stating the times and places where the acts of connection founded on by her oc-

curred, the necessity for condescendence and defences would be saved in the most, if not in all, of the class of cases in which the poverty of the pursuer, and often the poverty of both parties, makes it most desirable that the expenses should be least. The same remarks apply to many cases, in which it is felt to be necessary at present to have recourse to condescendence and defences. The record made up by minute of defence was for some time rather in disfavour, having been adopted in some cases to which it was not suited, and moreover the minutes of defence were not at first very well prepared. No difficulty is now felt in minuting the facts and the pleas in law on which the defender founds; and there would be no more difficulty in so stating the case of the pursuer.

In ordinary actions for small sums some limit to the expense of litigation might very reasonably be fixed. In some instances the amount of expense is practically limited; for example, cases under L.12 are carried on in the Small Debt Court, and in all cases under L.25 the sheriff's judgment is final. It would not be found any very serious, or other than a salutary, restriction were it to be the rule that in all causes under L.50 the record must be made up by a minute stating the grounds of action (when necessary, in addition to the summons) and a minute of defence. In some cases, even when the sum at stake is small, records must be made up by condescendence and defences; but that should be only when specially ordered by an interlocutor setting forth the reasons, and perhaps the party on whose motion such an order is made, in order that, should it be found to have been obtained on frivolous grounds, the liability for the expenses of process may be adjusted accordingly. The record in cases where the sum concluded for exceeds L.25 would much more frequently than at present be made up without condescendence and defences if there existed some provision for minuting any statement or pleas for the pursuer. In such cases the necessity for a record may very well be left to the discretion of the Sheriff-Substitute and the parties as at present, with power to make up the record by minutes. Where condescendence and defences are ordered, we do not see that the regulations regarding these papers can be much improved.

If parties are not agreed on the facts averred, the case goes to proof. Instead of the long written proofs often taken by commissioners, the proof is now invariably before the Sheriff-Substi-

tute, who must with his own hand (or in certain cases by a clerk, to whom he must dictate,) preserve notes of the evidence. The advantages of this change in the manner of recording the evidence are very obvious. Some lawyers are of opinion that the judge before whom the witnesses are examined is the best, and ought to be the only, judge of the facts; and that to put upon him the duty of recording notes of the evidence at such length as to allow of his judgment on the proof being reviewed, deprives him of the power of observing the demeanour of the witnesses while under examination, sufficiently to enable him to judge of their credibility. In this opinion we do not concur. To make the Sheriff-Substitute, or the Sheriff who takes the proof, the sole judge in questions of fact, would be entrusting too much to the sagacity and skill of one man. It would be throwing a responsibility on the judge scarcely fair either to himself or the litigants. When weight should be given to the demeanour of witnesses, either in increasing or diminishing their credibility, the judge can scarcely fail to notice it, even though he is engaged in noting the evidence. Any observations he makes on the bearing of witnesses are generally given weight to, and, as a rule, the view of the evidence taken by the judge before whom it is led has much influence with any Court of review. That is the full extent to which, where a large sum is at stake, it appears advisable that questions of fact should be left without appeal to the decision of the Sheriff or Sheriff-Substitute. The present system of preserving notes of the evidence imposes in some Sheriff-Courts a great amount of very exhausting labour on the Sheriff-Substitutes, and occupies a very large proportion of the time of these officials. This can scarcely be remedied in the country; but in large towns, where such assistance can be had, the proof might be advantageously recorded by a short-hand writer. When there are a large number of proofs, the cost of so recording the evidence would not add much to the expense. The time saved to the judge and the agents would be considerable, and the cost of keeping witnesses long in attendance would be much reduced.

The debate on the closed record, or, where proof is necessary on the import of the proof, is the last step before the Sheriff-Substitute pronounces judgment. Oral pleadings were looked forforward to with much dislike by many practitioners. It was prophesied that they would be a failure; but the result has been otherwise. The practitioners in the Sheriff Court have generally

proved themselves well able to conduct debates, and the assistance so given to the Sheriff-Substitutes and the Sheriffs has been very valuable.

It is not easy to prescribe rules for cases originating by petition, and actions *ad facta præstanda*. After the petition in the form of the schedule appended to the statute, the procedure under the present system is the same as in ordinary actions. To this the only addition that seems advisable is that, unless for special reasons stated in the interlocutor ordering answers or condescendence and answers, the record should be made up by minutes for the parties. In actions *ad facta præstanda*, it is sometimes difficult to judge of the value at stake, and it may be difficult to determine whether they should proceed according to the forms appropriate to causes for large or small sums. As a general rule, the record ought to be made up by minutes, unless where special reasons are stated for proceeding otherwise.

It is not only the final judgment of the Sheriff-Substitute that may be brought under review of the Sheriff, but also certain interlocutors in the course of a cause—viz., interlocutors disposing of a dilatory defence, sisting process, allowing proof, and, under certain exceptions, interlocutors on the admissibility of evidence. There are three forms by which judgments may be appealed to the Sheriff:—1st, By minuting under the interlocutor of the Sheriff-Substitute the words, "I appeal against this interlocutor," within seven days after the date of the interlocutor. If nothing more is done the case is sent to the Sheriff, who disposes of it. 2d, Within eight days after minuting his appeal, the appellant may lodge a reclaiming petition. The process is then transmitted to the Sheriff, who may either dispose of it on the reclaiming petition or order answers. 3d, Within eight days after minuting an appeal, the appellant may lodge a minute craving to be heard orally. With this minute the case is transmitted to the Sheriff, who appoints parties to be heard at his next sittings in the county for hearing appeals; but he has 'power, in cases requiring extraordinary despatch, to order a reclaiming petition and answers, instead of hearing the parties orally." By the statute, the Sheriff holds annually only four sittings, and in some northern counties only three, for hearing all causes ready for trial or hearing. One result of an appeal against an interlocutor pronounced in the course of a cause, and a minute craving an oral hearing, is to stop all procedure till the Sheriff

holds his next sittings. The appealable interlocutors in the course of a case are not many, but it appears essential to justice that the right of appeal should not be further restricted. No doubt some Sheriffs whose counties are near Edinburgh may visit them more frequently than four times annually; and the Sheriff has power, in such cases as require extraordinary despatch, to order reclaiming petitions, instead of allowing them to lie over till his next sittings; but delay is not always thereby prevented. But few counties are so easy of access that a Sheriff, who is in large practice, can make frequent visits to his jurisdiction during the session of the Supreme Court; it is not in every case, when a reason for despatch exists, that it is apparent on perusing the papers; and it is hard to impose, where it is unnecessary, the expense of an appeal by reclaiming petition where the cheaper form of an oral hearing has been selected by the party appealing, and may be sufficient. Against all interlocutors pronounced in the course of a cause, the appeal ought to be made only by a minute of appeal, or, in cases involving large amounts, by reclaiming petition. If the Sheriff finds it difficult to dispose of the appeal without argument, he should have power to order it; but the necessity for a reclaiming petition might very well be left to his discretion in cases of small amount. In appeals against final judgments of the Sheriff-Substitute, a defender fighting only for delay has the same chance of obtaining it by craving an oral hearing. The appellant who brings up a final judgment in an important case, must have an opportunity of arguing it; but cases of small value—perhaps all causes under £50—may be quite well taken to review by a simple appeal. The conclusions of the summons, and minutes of the ground of action, and the nature of the defence, and the pleas of parties, with the note explaining the judgment appealed against, may inform a lawyer quite sufficiently to enable him to dispose of a cause. The Sheriff should, in every case, have power to order oral argument when his sittings are near at hand, or a reclaiming petition and answers, as may appear to him most expedient. In some counties the number of cases in which argument is submitted to the Sheriff is very small, and the number in which it is necessary is still smaller. It is to be regretted that a right of appeal should be capable of being abused by being made a means of obtaining unnecessary delay, and it does not appear that any injury can result from the right to submit arguments to the Sheriff on appeal being limited, as we have suggested.

The profession generally has approved the changes introduced into our forms of process by the Sheriff Court Act of 1853. Practice has made some of the new machinery, which seemed at first inconvenient, work smoothly enough. We venture, however, to think that our practice is still susceptible of some improvements, and have, in noticing the steps in the progress of an ordinary action, suggested the points in which some changes seem most desirable. Possibly the expense and delay ought not to be reduced in the way we have suggested in cases of larger amount than £25 ; for in experimenting, it is well to be cautious, and the fact that the Sheriff's judgment in causes under £25 cannot be reviewed, makes that amount a convenient resting place.

Experience of the working of the Small Debt Courts with a jurisdiction extending to £12, has obtained for them the same verdict of approval that was pronounced when the jurisdiction was only £8 6s. 8d. From no quarter has any demand come for a reduction of the jurisdiction to its former amount. On the contrary, the demand made by the commercial bodies has been for its extension. They again, (as they did previous to 1853), crave that the Small Debt jurisdiction should be extended to the same amount as that of the County Courts in England, with an appeal in causes exceeding £25. It seems not unreasonable that this demand for an increase should be complied with, but to what extent, is a very serious question. To import into this country the County Court system of England, embarrassed as it is with appeals, would not be regarded approvingly,—as was remarked by the Lord Advocate at his recent interview with deputations from the Chamber of Commerce, and Trade Protection Society of Edinburgh. It is in any view unadvisable to make so material a change in the character of the procedure in the Small Debt Court as that involved in the introduction of a right of appeal, beyond what is at present permitted. Provision for an appeal must necessarily accompany an increase of the jurisdiction in defended causes to so large an amount as £50. The most valuable feature of the Small Debt Court is that a final decision may there be obtained in a few days after serving the summons, and at a cost of a few shillings. The general approval of the working of the Small Debt Courts, and the demand for an increase of the jurisdiction, shew that the time has now arrived when some increase should be made. In litigated causes, that increase might

be made with safety to the amount of £18 or £20. Where no defence is made, there is no reason for limiting the jurisdiction to that amount. The last Sheriff Court returns shew that in almost every county decrees in absence are pronounced in more than one-half of the ordinary actions brought into Court. The expense of decrees in absence in causes of less value than £25 seems to be excessive. That a decree unopposed for any sum under £25 should cost £1 15s., seems a very great hardship on traders, and calls loudly for remedy. The suggestion that all cases under £50 should originate in the form of Small Debt actions, and where the value exceeds the Small Debt jurisdiction, should be at once remitted to the ordinary Court when a defence is stated, would remove the just complaint as to the cost of decrees in absence in the ordinary Court, and at the same time not leave too much to the sagacity and skill of a single judge.

Along with any extension of the Small Debt jurisdiction, the provision of the Small Debt Act, which prohibits the appearance of agents, except with the leave of the Sheriff, ought to be amended. In many counties this provision has been so worked that agents appear in almost every case. The general desire for professional assistance is proved by its being had recourse to whenever permitted. The impolicy of the exclusion of an educated bar, has often been dwelt on. Besides, the appearance of agents puts all parties on an equal footing, neither the glib-tongued and impudent has any advantage, nor is there any risk that the modest, weakly, or inexperienced, will be unduly pressed upon. The appearance of agents is at present practically prohibited by the exclusion from the table of fees of any fee to an agent. A reasonable fee (perhaps an *ad valorem* fee, on the sum decerned for in all cases above £10) ought to be introduced into the table of fees for the Small Debt Court, which must necessarily accompany any increase of the jurisdiction. While such a charge would only be a reasonable addition to the expense thrown upon an unsuccessful litigant, it would be a fair measure of the proper charge exigible by an agent from his client when not found entitled to expenses.

NOTES IN THE INNER HOUSE.

IMMUNITY OF THE CROWN FROM LOCAL TAXES—PREROGATIVE.

H. M. Advocate and Barbour v. *Lang.*

THIS case raised the question whether the admitted exemption of the Crown from the payment of any impost to which it is not made liable by express mention, or by necessary implication, in an Act of Parliament, extends to the burden of maintaining the foot-pavement in front of the barracks in Gallowgate of Glasgow. The Procurator-Fiscal of the Dean of Guild Court, attempted to take this case out of the general rule, founding on the provision of the Glasgow Police Act, which provides for the maintenance of such pavements, not by a general assessment, but by imposing on proprietors the duty of making and repairing the pavements adjoining their respective properties. Instead of laying on all proprietors an assessment for the maintenance of all the foot-pavements of the city, it creates an obligation *ad factum praestandum* against each; and the only remedy in case of failure to implement that obligation, is that the Dean of Guild may grant warrant to the Procurator-Fiscal to get the necessary work done, and decern against the recusant proprietor for the ascertained cost. This was a suspension of such a decree, obtained against the barrack master. The majority of the First Division held that the peculiarities in the nature of the tax in this case did not take it out of the general rule established by the previous decisions. Lord Curriehill differed on two grounds—(1) that this was not a money-tax, but an obligation *ad factum praestandum*, which did not fall under the Crown's immunity from payment of taxes. His lordship went into an examination of the origin of this immunity in the law of Scotland, and came to the conclusion that it was introduced by usage since the Union, a usage which had never been extended to such an obligation as that in question. It certainly appeared that the usage had been the very reverse, the Crown having, in fact, made and maintained this piece of pavement until recently. The second ground on which his lordship differed was that the Crown was by necessary implication brought within the scope of this statute, as being named in the statutory Valuation Roll as the owner of the land and heritage, in respect of which this obligation was imposed, and the Valua-

tion Roll being expressly referred to by the Police Act for the name of the obligant. The majority of the Court, in disregarding the latter of these arguments, no doubt were aware that a similar contention was over-ruled or disregarded in the case of *H. M. Adv.* v. *Garioch* in 1845, reported Jan. 22, 1850, 12 D. 447.

The origin of the immunity which has given rise to the present question, is ascribed by Lord Curriehill to a usage which has prevailed since the Union. We cannot but refer to a statement by the same eminent judge, eleven years ago (*Advocate Gen.* v. *Mag. of Inverness*, Jan. 29, 1856, 18 D. 366, 371) ;—"Although the privilege does now belong to the prerogative of the Crown of Great Britain, it appears to do so because it belonged to the Crown of England prior to the Union; and like the other laws existing in England at that time regarding the levying of taxes, it became part of the prerogative of the Crown of the United Kingdom." We presume his lordship here refers to the 6th sec. of the statute 6 Ann. c. 26, for establishing a Court of Exchequer in Scotland. It is there enacted that the Court of Exchequer in Scotland shall act and proceed in every respect whatever as the Court of Exchequer in England has used or practised in like cases in England. That was the *ratio decidendi* in *Adv. Gen.* v. *Garioch*, *supra*. It may be suggested whether a still larger principle of general jurisprudence does not establish this immunity, namely, that where such a union has taken place as that between England and Scotland, there must be one constitutional law common to both countries, and that will naturally be the constitutional law of the leading or dominant country. It is quite true that an opinion entitled to the highest respect was in this case stated from the bench, to the effect that it did not necessarily follow from the Union that all that belonged to the Crown in England belongs to the Crown in Scotland, the Union having been a union of two equal and independent states; and that there would be as much reason for saying that all that belonged to the Crown of Scotland before the union should belong to the Crown in England now. With all submission, it seems impossible to hold that such a question of constitutional law may be differently determined on the two sides of the border. That position seems already excluded by the 18th article of the Treaty of Union, on which the whole fabric of Scottish jurisprudence rests,* and which provides

* The whole Article is as follows:—"That the laws concerning the regulation of Trade customs, and such excises to which Scotland is, by virtue of this treaty, to be

that "all laws which concern public right, policy, and civil government may be made the same throughout the United Kingdom" (1707 c. 7). The principle has been applied in all questions as to national character, which depend chiefly no doubt on imperial statutes, but in which the principles of English law have been fully adopted. See *Dundas* v. *Dundas*, 1839, 2 D. 31, in which previous Scotch decisions were overruled in deference to the subsequent case of *Doe* v. *Acklam* in England. This is not the place for a full discussion of the question whether there is any difference in the public law of Scotland and of England; a question which must, we think, be answered in the negative. We may refer our readers to the opinions of Lord Eldon and Lord Redesdale in the *Strathmore Peerage Case*, 4 W. and S. Append. 89, and in *Macao* v. *Officers of State*, 1 Shaw's App. 138.

The Law of Settlement.

Beattie v. *Adamson.*

The law regulating parochial settlement in Scotland, has been the subject of a decision at first sight somewhat startling. A pupil child in weak health was, during her father's desertion of his family, received into the poorhouse of a parish, the father having at the time a residential settlement in another parish. He returned shortly afterwards, and has since maintained the rest of his family, but has contributed nothing to the support of his invalid child, who still remains a burden on the parish which first relieved her. Meanwhile her father lost his residential settlement, and more than a year after that had happened, statutory notice was for the first time sent by the relieving parish to the parish of the last settlement, that the latter was held liable for the past and future maintenance of the child. On its refusal to admit liability, an action was raised to enforce the claim; and, in

liable, be the same in Scotland, from and after the union, as in England, and that all other laws, in use within the kingdom of Scotland, do after the Union, and notwithstanding thereof, remain in the same force as before (except such as are contrary to, or inconsistent with, this treaty), but alterable by the Parliament of Great Britain; with this difference betwixt the laws concerning public right, policy and civil government, and those which concern private right—That the laws which concern public right, policy, and civil government, may be made the same throughout the whole United Kingdom, but that no alteration be made in laws which concern private right except for evident utility of the subjects within Scotland."

the course of the proof led in the Sheriff Court, the defender made an admission to the effect that the child, in respect of its health, had all along been "a proper object of parochial relief." The Second Division of the Court, reversing the decisions of both the Sheriffs, and also of the Lord Ordinary, held the defender liable to support the child since the date of the notice. The grounds of the decision mainly rested on the above admission. The judges thought that its terms plainly imported that, at the date of her first receiving relief, the child was a pauper in her own right. At that date, her settlement acquired through her father, but possessed by her in her own right, was in the parish of her father's settlement, and having once become a pauper, she could not lose this settlement unless and until she became rehabilitated. This is, we believe, the first time that there has been a decision of the Supreme Court to the effect that an unemancipated pupil child, whose father is alive and able-bodied, can retain a separate and independent settlement from that of the head of the family. Assuming the interpretation of the defender's admission to be correct, and the law as applicable thereto to be sound, it is certainly unfortunate that so important an opinion should have been enunciated in a case where the decision rested on such narrow grounds; and that, though three consecutive judgments were reversed, it was held only by a majority of the Court. It is quite plain that the meaning attached by the Court to the admission was not that intended to be conveyed, or which, in point of fact, was conveyed either to the parties themselves, or to any of the inferior judges. The defender maintained it meant no more than that—putting out of sight the fact that the child had an able-bodied father—she was a fit object for relief. Indeed, if we read the admission in connection with the pleas, which are to a great extent rested on the fact that the father being able-bodied, his children could not be entitled to relief, it is impossible to suppose that the party intended to admit more, unless we assume that he wished deliberately to stultify himself. If this be so, that construction, which was most in accordance with the contentions of parties—assuming, of course, the construction to be a reasonable one—ought surely to have been given effect to. However that may be, and whether the Court, in construing the admission, paid too much regard to the mere words and grammatical construction, and too little to the intention with which it was framed, and to the accompanying circumstances, or whether the admission was so

broad as to leave them no alternative, in their view of the law applicable, we cannot but regret that the decision proceeded, not on the merits of the case, but on the conduct of those who managed it—a result always to be deplored, but more especially in a case of such delicacy and importance.

As to the abstract principle of law as here laid down, we have just one word to say. It appears to be a departure from, or at least an exception to, the doctrine which was so broadly laid down by the House of Lords in the case of *Adamson* v. *Barbour*, 1853, 1 Macq. 376, that the settlement of pupil children is inseparable from the then existing settlement of their father, however acquired, and wherever situated. According to this view, the right to receive relief operates practically as forisfamiliation. The burden of supporting one of the family is separated, and laid on other shoulders than those bound to support the rest. The pupil is apparently no longer the child of her father. We express no opinion as to the soundness of the decision. Very good law may often lead to very curious results which were never contemplated, but we think we have materials to justify the expression which, at the commencement of this notice, we applied to the decision. Curiously enough, in the case of *Hay* v. *Paterson*, Jan. 29, 1857, 19 D. 332, we find practically the same circumstances which have here occurred alluded to as possible. In that case the Court, following out the principle on which *Adamson* v. *Barbour* proceeded, held that the burden of supporting a lunatic pauper pupil whose father was alive, but had no settlement except that of his birth, fell, not on the parish of the pupil's birth, but on that of the father's. The Lord President said—"Whether at any after period, by the father's acquiring a residential settlement, or by the lunatic attaining majority or otherwise, any change may be introduced into the position of parties, I do not speculate upon it." The point, therefore, was not so very clear in 1857 as it has become in 1866.

New Books.

A Treatise on the Law of Scotland, relative to Parent and Child, and Guardian and Ward, by PATRICK FRASER, Advocate. Second edition by HUGH COWAN, Advocate. T. & T. Clark, Edinburgh; Stevens & Son, London; J. Smith & Son, Glasgow.

THIS work requires no introduction to the public. It is an expansion of one branch of Mr Fraser's great work on Personal and Domestic Relations, which has been out of print for the last dozen of years. It does not often happen to any one to write a book which at once takes its place as an institutional work, still less is this to be expected from a man who has just been called to the Bar, which was Mr Fraser's position when he first gave his work to the public. It was high time that a new edition should be published, and we are glad to see that, though, as might be expected, he delegates part of the labour of editing to friends, his own hand is visible throughout in the alterations made. There is the old unwearied industry in collecting from all quarters, and bringing into one focus, every ray of light which can help to illumine the darkness of obscure branches of the law—and the same strong handling and bold criticism of modern authorities.

During the twenty years that have elapsed since the first edition, many of our most important consistorial decisions have been pronounced, and in almost the whole of them Mr Fraser has been counsel on one side or other. Hence the book has a peculiar value and interest, because the author so often treats of matters "quorum pars magna fuit." Among the recent cases commented on is that of Fenton and Livingstone, in which the First Division judges, or some of them, seem to have thought that they could acknowledge the legitimacy of the issue of an incestuous marriage, without recognizing the validity of the marriage itself. "It would certainly," says Mr Fraser, "be a curious law which would hang the parents, if they came to Scotland, for incest, and, at the same time, recognize the legitimacy of the issue of these very persons." The view of the House of Lords was that, if the law of Scotland must refuse to acknowledge the validity of the marriage on the ground

of its being abhorrent to public policy, vile and abominable, and contrary to the Word of God, it must, in like manner, refuse all recognition of the immediate incidents of such a connection.

Every judgment within the last twenty years that touches on the subject embraced in this volume, will be found discussed with that absolute freedom which does not insist upon implicit acceptance of the views of the writer, but sets the reader a thinking for himself. Had the results of recent decisions merely been stated with all the conciseness and brevity possible, trouble might have been saved to the reader; but he would not have risen from the perusal of each chapter as he must now do—a better informed, and a more thinking lawyer. It is a great boon to the public to get such a work so edited. Besides the noting and discussing of all the recent decisions, the changes introduced by the Pupil's Protection Act, and the recent Lunacy Legislation, are both gone into at length. But there is no standing still in law. We have already a new Lunacy Act, but one that does little more (besides the special protection it gives to medical men) than continue and consolidate some of the previous statutes, and Mr Fraser's work, in which he gives his opinion against the liability of sons-in-law for the support of their fathers-in-law, was hardly published when the contrary was laid down by an unanimous judgment of the Second Division in *Reid* v. *Moir;* but, as this decision has been carried to appeal, we should not wonder if Mr Fraser's text continued to stand good. He quotes the case of *Macdonald*, and proceeds:—

'Lord Mackenzie observed:—"As to finding the daughters liable because they have husbands—viewing the husbands as a kind of estate—it is a thing I do not like to set the example of;" and to a similar effect the other judges. There is thus no authoritative decision fixing the point. But the *obiter dicta* of the Supreme Court in the most recent case are decidedly against the claim. To this it may be added, that, in a case which came before Lord Ormidale when he was Sheriff of Renfrew, he was of opinion that no such liability existed, and rejected the claim. The principle upon which it is thought that a son-in-law is not liable is, that while a husband is liable for the debts of his wife arising *ex contractu* before the marriage, and also for those which she contracts as *præposita* in household affairs after marriage, he is not liable for any claim arising *ex jure naturae*. The claim of a mother or father against a child is of this latter class; and it is thought that, unless the parent has before the marriage become dependent on, or is supported by the daughter, no claim in law exists against the husband on account of the supervening poverty of the parent.'

Apart from the additional authority and great value of the

work in its new form, embodying the experience of a life of the greatest professional activity, this book is really remarkably interesting for a law-book, containing, as it does, so much cruelty and adultery. There are plots for fifty operas, and a hundred and fifty novels.

The picture of Scotch manners is truly appalling. Just take the cases of Margaret, Dowager Queen of James the Fourth, who, after his death, married the Earl of Angus, which marriage was declared illegal on account of the Earl's pre-contract with another lady; or the case of the Earl of Rothes, who, after thirteen years of married life, had his marriage set aside as within what the Romish Church called forbidden degrees, and without papal dispensation. But, in both cases, the legitimacy of the issue was sustained. Perhaps the case of Rutherford of Edgerton may be more picturesque, where Catherine Rutherford, in accordance with the feudal rule, forfeited her inheritance* by "away ganging with James the Stuart of Traquair, committing her person to him in fornication, they being within the forbidden degrees." Thereafter they obtained a dispensation and married, and their issue ultimately recovered the inheritance, which had passed to Catherine's sister, who, though thrice married, had no issue.

A Manual of Conveyancing, in the Form of Examinations, embracing both Personal and Heritable Rights. By the late JOHN HENDRY, W.S. Second Edition. Revised by JOHN T. MOWBRAY, W.S. For the Use of Students. Edinburgh: Bell & Bradfute.

MR HENDRY'S Manual has acquired a certain reputation as a book for students, and even as a book of reference in ordinary matters of business when a higher authority is not at hand. But it is not, and it does not pretend to be, more than a *rifacimento* of the lectures delivered by the late Professor Montgomerie Bell in the early years of his occupancy of the Conveyancing Chair. Any work by a diligent student founded on Mr Bell's lectures—which we observe are to be communicated to the world within a few days in a fuller and more authentic form—could not fail to have some value; and, accordingly, Mr Hendry's work is at least

* "The infliction, I suspect," says Mr Riddell, in his 'Peerage and Consistorial Law,' "was more owing to its being identified with the feudal privileges and profits of the superior, who was entitled to present a husband to his ward, under a lucrative penalty if she refused, than to any high reverence for female virtue."

entitled to the praise of being a good student's manual. We are somewhat surprised, however, that the present editor should have bestowed so much labour in adding notes, supplementing, and, in innumerable instances, correcting the text, which he has preserved intact with the most religious care. Mr Mowbray is well able to edit or to write a book of far higher pretensions. We can only say that his labours have greatly increased the value of the Manual. It was at first the work of a diligent student—it is now enriched by the commentaries of a shrewd and experienced man of business.

The Month.

Outer House.—Change of the Hour of Meeting.—The members of the College of Justice have, with something approaching to unanimity, divested themselves of the ancient superstition in favour of early rising, which caused them so long to begin work at nine o'clock, an hour earlier than any other class of professional men. An Act of Sederunt has been passed giving effect to the representations of the three principal legal bodies, and enacting that the Outer House Rolls shall in future be called at ten o'clock. This cannot but be regarded as a salutary change in almost all respects. No longer must the toilsome jurisconsult labour up the Mound, cursing the Lord Ordinary and his own hard fate—

> Sive Aquilo radit terras, seu bruma nivalem
> Interiore diem gyro trahit, ire necesse est.

We doubt not that the new hour will soon be equally acceptable to all, even to that small minority in the Faculty of Advocates to whom old habit, and perhaps some constitutional peculiarity, had made the nine o'clock meeting dear. It would be unfair not to acknowledge the frank generosity with which even senior members of the bar in large practice concurred in the movement for a change of the hour of meeting. They alone are likely to suffer in convenience and in income by having one of the hours of the Outer House removed from the morning to the afternoon, when the Inner House is also sitting; and yet they, for the most part, gracefully concurred in the evident desire of the

majority. The open opposition which sprung up at the last moment must be attributed to the other motives we have indicated, together with a morbid fear, in some cases, of losing the Saturday half-holiday.

The Lord Advocate's Law Reforms.—We belong to no political party and have no political bias, so that the expression of our desire that Lord Advocate Patton may soon be blessed with a seat in Parliament can only be ascribed to respect for his professional character, and our interest in the cause of law reform, which he has shown himself zealous to promote. We congratulate him on having undertaken to lay before Parliament the seven bills, the subjects of which have been semi-officially announced. Many of them relate to matters which have frequently engaged our attention, but so little is known of their details, indeed we believe so little is absolutely fixed, and so little progress has as yet been made in the actual preparation of them, that minute criticism would be premature, and even detailed statements as to their contents, derived from information apparently well-founded, might eventually turn out to be misleading.

The Lord Advocate promises a revised edition of the Writs Registration Bill of last session. The work of the Select Committee of last summer enables him to bring this measure forward with a fuller knowledge of the whole subject than his predecessor ever enjoyed.

The bill to carry out the recommendations of the Royal Commission on the law of landlord's hypothec, with which, we understood, the late Solicitor-General had undertaken to deal last session, should be easily drawn and easily passed. The recommendations of the Commissioners were, it will be remembered, that all *bona fide* sales of grain delivered and paid for, should be protected from the hypothec; that the landlord should be entitled to sequestrate only within three months after each half-yearly portion of rent becomes due; and that all sequestrations for rent should be registered. They also advised certain declaratory enactments as to stock taken in to graze, and imported manure, &c. These reforms are certainly moderate, and the Lord Advocate, we hope, will have no difficulty in getting the bill passed.

The third bill is one to consolidate and amend the law as to nuisances and the prevention of contagious diseases.

The fourth is to deal with one of the most crying grievances

in the administration of justice in Scotland, the exorbitant expense and delay of actions of accounting. When the proper time comes, we shall probably have a good deal to say as to the enormities of remits to accountants. At present we need only state, that the Lord Advocate intends to provide for the appointment of one or more official accountants, to whom the investigation of disputed accounts will be committed. No change is contemplated in the forms of pleading in such actions.

By far the most important changes to be proposed, and those which will excite the liveliest controversy, relate to Sheriff Court procedure and the mode of appeal from the judgments of Sheriffs. Here the Lord Advocate has fallen into the hands of the shopkeepers; but it is only fair to say that he means to give them their extended small debt jurisdiction only within limits and under conditions, which may prevent some of the abuses and difficulties which would inevitably follow its unqualified extension to L.50. The new provision is to apply only to trade debts, or, as they are sometimes called, "book debts." These will be defined to mean all debts falling within the triennial prescription. We understand that cases up to L.50 are to be brought into Court by an ordinary small debt summons or plaint; that any defence must be stated at first calling; that proof will be led, if necessary, at an adjourned diet then fixed, and that the Sheriff will be required to pronounce thereupon articulate findings in law, which shall be the only record in the cause, except in the case aftermentioned. In short, the Sheriff's judgment is to be equivalent to a "case stated," such as we have often advocated in these pages. The Sheriff-Substitute's findings in fact are to be final, but an appeal to the Sheriff-Depute and the Court of Session is to be competent (1) upon his findings in law, and (2) upon the findings in fact, so far as they depend upon or are mixed up with his view of the law. It is proposed to introduce a somewhat novel remedy in the latter case. The Sheriff or the Court of Session, having no record of the evidence, cannot find differently, cannot alter or reverse the Sheriff-Substitute's judgment; but they are empowered to remit for a new trial. We venture to think that this will be altogether nugatory, unless the new trial be before a different judge, and this we think should be imperative, and not optional to the Court of appeal. The principal Sheriff should always be judge and jury in the second trial. The idea is evidently borrowed from the system of jury trial; but

when a verdict has been overturned the issue is always re-tried before a fresh jury. Unless this analogy be fully carried out in the Lord Advocate's new scheme, we can expect nothing but failure. It is provided that the appeal which may be so taken shall be in a short form, and shall be *either* to a Lord Ordinary, whose judgment shall be final, or to one of the Divisions. The cumbrous advocation is to be entirely abolished, but the method of review by suspension is left untouched.

It is to be made competent in the new procedure, in cases under £50, for either party who desires a review upon the facts to have the whole evidence taken down at his own expense by a sworn shorthand writer; and we presume this provision will be made applicable to cases in the ordinary Court, and not merely to cases where the debt sued for is less than L.50.

Besides the five measures which we have enumerated, the Lord Advocate proposes, by another bill, to deprive Presbyteries of their jurisdiction in respect to the building and repair of churches and manses, and the designation of glebes, and to transfer it to the Sheriff-Depute. *Prima facie*, no one can object to the substitution of one presumably trained and impartial judge for a multitudinous Court of presumably biassed and utterly unjudicial judges.

In the interest of jurymen and witnesses, it is proposed, by a seventh bill, to provide that all persons who shall be remitted for trial to the Court of Justiciary, and who shall be likely to plead guilty, shall be brought up to a "pleading diet" of the High Court at Edinburgh. Why not let such prisoners be called up to plead before the Sheriff? This might injure the symmetry of our judicial institutions; but the transmission of prisoners is expensive. The measure, as it stands, almost looks like a step towards the abolition of Circuit Courts; for it may be discovered by a law reformer of the next decade that, when prisoners are once brought to Edinburgh, it is nearly or quite as cheap, and a great deal more convenient and pleasant for judges and counsel to try them there. And most prisoners will probably choose to vary the monotony of life in jail by a trip to Edinburgh, whether or not they really mean to plead guilty when there.

Upon the whole, the Lord Advocate has promised a very excellent sheaf of bills; for, though there are many other things which we wish to see done—such as the restitution of those im-

portant clauses of the Summary Procedure Bill of which the Duke of Buccleuch robbed the country—yet law reforms are not so easily achieved that we should hesitate to take any good thing that is offered.

Practice in granting Augmentations of Stipend.—The case of the *Minister of Kilbirnie* v. *The Heritors*, decided last Teind Court day, may be of some importance in ruling the future practice in regard to augmentations where the existence of free teind is disputed. In this case it had long been assumed that the teinds were exhausted, and the present process of augmentation was brought after the lapse of fifty years, on the discovery of an alleged flaw in a valuation. The Court in the circumstances sisted the process to allow the minister to bring a declarator. It was contended for the minister that the proper course, in accordance with the recent practice of the Court, was to grant the augmentation, leaving it to be ascertained in the process of locality whether there was or was not free teind. But the Court refused to do so, because if such a course were adopted the heritors founding on valuations might be obliged to pay the augmented stipend, perhaps for thirty years, upon an interim scheme of locality, to which they had no opportunity of objecting; and if eventually it should be found, on the final scheme being prepared and objected to, that there was no free teind, they might have no redress against the minister. This decision seems to lay down a very important principle for guidance in future cases, and one which has perhaps been somewhat lost sight of in late years. The Court has hitherto granted "fishing augmentations" on very little *primâ facie* evidence of free teind. *Minister of Bathgate* v. *Heritors*, Dec. 9, 1863, 2 Macph. 224. Nay, in the *Minister of Morvern* v. *Heritors*, Nov. 22, 1865, 38 *Sc. Jur.* 49, the Court "granted an augmentation, leaving the minister to establish in the locality the existence of unexhausted teinds." The Lord President observed that "the former practice had been to grant an augmentation without considering whether or not the minister had made out a *primâ facie* case of free teinds, that that was the most expedient course, and that the Court would not in future entertain that question." There has certainly been a very remarkable and inconvenient fluctuation of opinion on this matter of late years. It seems, however, to indicate a tendency to a change for the better, that the Court has refused to grant an augmentation where the objection stated to the decree of valuation was admittedly as

strong, or nearly as strong, as that sustained in the recent case of the *Minister of Dunbarney* v. *Heritors* (*Kirkwood* v. *Grant*), Nov. 7, 1865, 4 Macph. 4. Are we now to see in operation the principle contended for by Lord Benholme, "that in regard to old valuations which have stood the test of two centuries, fair play ought to be given to them; and that what they set forth ought to be held *pro veritate*, unless they are impeached by reduction?" *Minister of Banchory Devenick* v. *Heritors*, Feb. 3, 1865, 3 M. 482, 492. Or are we to expect an Act of Sederunt, such as that recommended by the Lord Justice-Clerk, and it is said strongly urged upon the Court by Lord Barcaple, cheapening and simplifying the procedure in such questions, and enabling a minister to get the existence of free teind inquired into in the process of augmentation?

The Teind Court.—It was noticeable that during the greater part of the sitting of the Teind Court in which this decision was pronounced, the place of Lord Barcaple was vacant. It is not wonderful that he should consider it more important to get through his ordinary business than to form a part of the pageantry of the Court of Teinds. The amount of ordinary business at his lordship's bar is very great; the number of debates waiting for hearing being so large that, it is said, his lordship will probably fix no more proofs to be taken before himself during the present session. Moreover, under the existing Outer House arrangements, Lord Barcaple's working week is very much broken up. Tuesday is the only entire day which he always has for the ordinary roll. Every other Wednesday he attends the Teind Court. Thursday is his blank day. Friday is entirely occupied with Teind business. Saturday is only a half day. Thus, assuming that each Teind Court occupies only one hour (which is under the average), his lordship is allowed only twenty-five hours in each fortnight for ordinary motions and debates, without deducting the time occupied by jury trials and proofs. Whether any larger reform of Outer House arrangements may be practicable we do not now say. But the absurdity of keeping eight or nine judges sitting every alternate Wednesday to determine whether two or three ministers shall have twenty pounds of additional income, should surely be put an end to. It not only interrupts the business of the Lord Ordinary on Teinds, but that of the Inner house. It is quite unnecessary that this should be so. The Teind Court consists of the judges of the two Divisions and

the Lord Ordinary for Teinds, and FIVE judges constitute a quorum (2 and 3 Vict. c. 36, § 8). There is therefore no reason, except perhaps the reason of ostentation, why both Divisions should be stopped for the generally paltry business of this Court. Four judges of one division, and one taken from the other, will make up a Teind Court, which might be presided over by the two chiefs alternately, leaving the other Division to go on with three judges, and letting the Lord Ordinary on Teinds attend to his proper business for the day. There can be no doubt that some such arrangement was in the view of the Legislature in passing the measure referred to. Of course a larger Court might still be formed to hear any cause of importance. We have thus suggested how the Court may expedite business and economize judicial power, without any external interference. The judges have of late years shown themselves laudably anxious to carry out such reforms, and we trust that it will be in this case unnecessary for impatient suitors to refer the matter to the reforming ardour of the Lord Advocate. When Parliament deals with the Teind Court, there must be far more radical alterations than this.

The Registration Appeal Court.—This Court has concluded its annual sitting since our last issue, and the rapid and satisfactory manner in which its work was done, is, apart from other considerations, a sufficient justification of its institution. The points of registration law decided have not been numerous, for, as commonly happens, each year produces a crop of questions, in the different counties where political warfare exists, all turning very much on the same, or similar legal principles. This year the largest class of cases related to "value," and the questions were, generally, what deductions should be made in estimating the value of the property in respect of which a party seeks enrolment. The general principle deducible from the terms of the Reform Act unquestionably is, as Lord Ormidale well expressed it, "that we are not to be too curious as to titles—that the substantial right and interest is to be looked to." Hence it was held (*Henderson* v. *Maxton*, Nov. 1866) that a widow's terce must be deducted from the value of the subjects on which her husband's heir is enrolled, although she is neither served nor kenned. In a question with the heir, who is, in fact, where kenning has not taken place, a joint *pro indiviso* proprietor along with her, the widow "has as complete a right to her terce as he has to the lands." The notorious fact that the formality of serving, and

still more that of kenning to the terce, have almost become obsolete in practice, made it difficult to arrive at any other result, even under the guidance of so deservedly high an authority as Sheriff Fraser. It would have been virtually to affirm the general proposition that terce should never be deducted at all. This decision is in conformity with the old registration law (*Cay*, 215). The case of subjects subfeued in lots, without any allocation of the *cumulo* feu-duty recognized by the superior, affords another illustration of the general principle referred to. The feu-duty which the sub-vassal actually pays "as a condition of his right" (in the words of the Reform Act), and not the *cumulo* feu-duty for which his portion of the ground is contingently liable to the over-superior, is to be deducted from the value of his property. (*Shaw Stewart* v. *Hector*, Dec. 1, 1866; *Stewart* v. *Macfarlan*, and other cases.) This sets at rest a question fiercely contested, and perhaps never finally settled in the old Registration Courts. (Cay, 217, sqq.)

In another case (*Guy* v. *Reston*) it was held that a proper ground-annual is an "heritable subject" in the sense of the Act, and therefore affords a good qualification. It is thus distinguished from the anomalous qualifications rejected last year in the cases of *M'Culloch* v. *Freeland*, 4 M. 130 (a "free yearly annuity" heritably secured), and *M'Culloch* v. *Smith*, 4 M. 132 (a "liferent yearly ground-annual").

In *Guy* v. *Paterson*, Nov. 21, the Court decided that the proprietor of a piece of ground laid off for building, but on which no houses have yet been built, which is of no agricultural value, but would bring £290 if sold as a building stance, is not entitled to be enrolled. The Sheriff of Renfrewshire had decided that he was, and that decision seems to be more nearly in conformity with the natural construction of the Act, as well as with common sense. It is also the principle adopted by the Court of Common Pleas in England. In the case of *Astbury* v. *Henderson*, 15 C. B. 251 (1854), the case showed that A had bought building ground for £150, and had refused an offer of £15 a year of ground rent for it. Jervis, C. J., in sustaining his claim, said, "The true question is, what is the land reasonably worth? what would it fetch in the market? . . I felt at the moment impressed with the argument that the realisation of that value depends upon something to be done with the land. . . But when it comes to be considered, it is evident that in all cases the value of the land depends upon something that is to be done with it by the owner."

". . It seems to me that the price originally given for the land, the offer made and refused, and the finding of the revising barrister that, if let upon a building lease for 99 years, it would be worth an annual ground rent of £15, shew that this land is of the clear yearly value of £40 and upwards, and entitles the owner to a vote within the 8 Hen. 6, c. 7." Maule, J., said, "The revising barrister seems to have thought that if the appellant had the power to let the land to a tenant from year to year, or upon an ordinary occupation lease, at a rent amounting to 40s. a year, the estate would be sufficient to confer a vote; but that it would be otherwise where that is to be done by a building lease. I see no ground for the distinction. True, you cannot let land on a building lease till you have found some one willing to be a lessee. It is equally true that, until you find a tenant you cannot create a tenancy from year to year." We cannot but think that this is the true meaning of the statute, which does not require the owner to be in receipt of issues and profits, if he is "in the occupation" of the subjects. Here the subjects were proved to be "capable of yielding" the necessary revenue, and the owner was in the occupation of them so far as they were capable of occupation. The former Registration Courts seem to have adopted the English principle in one case at least (*Cay*, pp. 162, 207.)

It was one of the most noticeable features in the proceedings of the Court, that the "cases" stated by the Sheriffs were often severely criticised by the judges as being disconform to the statute, and that one of them (*Cameron* v. *Anderson*, Nov. 28) was so defective, that the appeal was dismissed. Probably several others deserved the same fate. It is much to be regretted that any failure should take place in a form of procedure which, we hope, will ere long be much more extensively applied in Scotland. Lord Kinloch said that "it would be expedient for Sheriffs to read and act upon the decisions of this Court." We may add that the cases stated in election and other appeals in England, with the decisions thereupon, would also be a profitable study. It is surely time that learned Scotch lawyers should be able to perform a duty which in England (and even in Scotland, see *Reg.* v. *Gilroys*, March 20, 1866, 4 M. 656) is performed with facility and accuracy by every justice of peace clerk. It is not the Sheriffs alone upon whom all the blame must lie. It is the duty of the appellant, at times, no doubt, a somewhat delicate one, but still his duty, to see that the case is properly prepared.

The Sheriff has to draw it up hurriedly, in order that it may be delivered in open Court at a time convenient for all parties; and he is entitled to, and will always be ready to accept, every assistance from both sides; so that the party appealing has generally himself to blame if his case is defective. We assume, of course, that the usual and only proper course is adopted, that the Sheriff reads over the scroll case in presence of the parties, and hears their suggestions as to the facts which should be stated, and the form of the case.

The New Professorship of International Law at Cambridge.—Dr Whewell, late Master of Trinity College, Cambridge, among the many benefactions to that university with which his whole career was identified, and on which his whole affections were centred, founded a Professorship of International Law, with a salary of £500 a year. With a quaint, humorous appreciation of the flagging interest felt in the university and the study of law, he has made a provision against his professorship being converted into a mere sinecure, to which we would call the attention of all persons desiring to add to the teaching staff of our universities. We would also impress upon them the propriety of never founding a Chair with a smaller salary than that which is provided by the rev. Doctor. The *Law Times* says:—

"The late Dr Whewell, by his will, devised and bequeathed to the master, fellows, and scholars of Trinity College certain property upon trust for the promotion of the study of international law in the university of Cambridge. For this purpose he made provision for the endowment of a professorship and scholarships in the university—the former to be called 'the Professorship of International Law,' and the latter to be obtained by proficiency in the said subject. The electors to the professorship and scholarships are to be the Vice-Chancellor, the Master of Trinity (with casting vote), the Regius Professor of Civil Law, the Professor of Moral Philosophy, the Professor of the Laws of England, and the Professor of Political Economy. The Professor is required to give at least twelve lectures on, or in connection with, the subject of international law in every academic year, and his stipend (£500 a year) is to be dependent on his obtaining a class of at least ten resident members of the university. The Professor is enjoined by the will to make it his aim in his lectures, and in all parts of his treatment of the subject of international law, to lay down such rules and to suggest such measures as may tend to diminish the evils of war, and, finally, to extinguish war between nations."

The Procurators' Act.—Our attention has been called to a notice, in a contemporary, of a decision of the Sheriff of Ayrshire under the Procurators' Act, which is apt to lead to misapprehen-

sion. It bears that the "Sheriff refused an application for admission as a procurator by a person who had passed the usual examinations and been found qualified, but who had served an apprenticeship with a writer in Oban, who, although a notary public, *a procurator-fiscal*, and a general law agent, was not a procurator before a Sheriff Court." The decision turned upon the 4th sec. of the statute, and the 157th sec. of the A. of S., 11th July 1839. The latter allows as a qualification apprenticeship to, among others, "a procurator before any Sheriff Court in Scotland or Court of Royal Burgh;" and the question was, whether the fact that the master in this case was public prosecutor before the Justices of Peace and before the magistrates of Oban, which is not a *royal* burgh, made him "a competent master" in the sense of the Act of Parliament and Act of Sederunt. It was contended that the Act was to be liberally construed, and that the position of the master in this case was really equivalent to that of the fiscal of a royal burgh. The Sheriff, however, held that to admit the gentleman claiming would be a violation of the Act.

Fees Payable by Stamps.—The Act 29 and 30 Vict. c. 76, makes it lawful for the Commissioners of the Treasury to direct that all fees payable to any public department or office connected with the public service, or to the officers thereof, shall be collected by means of stamps, impressed or adhesive. A notice has been published in terms of the Act, in the *London Gazette*, that after Dec. 31, 1866, the fees for the time payable in the Companies' Registration Office, or to the officers thereof, shall be so collected. Why should not Fee Fund dues be collected in this way, if that tax on justice is still to continue?

A Dialogue in Court.—(*Thoms v. Thoms*):—

Ld. P.—Dean of Faculty, have you anything to say?

D. of F.—We have nothing further to say than we have said already.

L. P.—Then you don't want any proof?

D. F.—We have given in a minute.

L. P.—I understand you to say that you do not ask any proof?

D. F.—That is what our minute says.

L. P.—Then the deeds have been produced by the defender. You desire no further proof, Mr Balfour?

Balfour—No; these deeds are put in as our proof.

L. P.—Then we will make an interlocutor to that effect,—that the pursuer states that all the proof he desires is now in, that he desires no further proof, and that the defenders desire no proof. I suppose parties will be ready to go on to-day. . . . . Is there to be any further argument?

D. F.—I understood that the argument had been concluded.

Ld. Deas—That may or may not be. We did not know, at least I did not know till now, that there was to be no further proof, and all I shall say is, that I think the argument may be very different on that footing from what it might have been on another.

Ld. Ardmillan—I thought the whole argument had proceeded hitherto on the assumption that there was to be no further proof. Whatever may turn out afterwards, the case before us at present which we have to dispose of is a case on the footing that there is to be no further proof excepting these documents which have now been produced.

Mr Young—The pursuer not only argued on that assumption, but maintained that further proof was incompetent, and I answered him on that footing.

(Meantime the Lord President has been writing proposed interlocutor, and now reads it to the Court.)

D. F.—My Lord, we don't say that.

L. P.—But you say you don't want a proof.

D. F.—What we have said is that we don't ask any proof.

L. P.—Do you desire a proof or do you not?

D. F.—We have nothing more to say.

L. P.—But I am entitled to an answer to that question, Mr Dean. Do you desire a proof or do you not? If you do not I must enter on record that you do not.

D. F.—What our desires may be we don't think it necessary to say. All that your Lordships can take cognisance of is what we state at the bar, that we move for. We don't move for any proof.

L. P.—But I am entitled to ask you whether you wish for a proof?

D. F.—I say I have no wish on that subject beyond what I have said.

L. P.—If you don't say that you desire a proof, I must enter on record that you don't desire a proof.

D. F.—(Interrupting)—That I have not said that I desire a proof. That is all your Lordship can say.

L. P.—I must hold the thing as concluded now or as not concluded, and I think it will be concluded if you don't want a proof.

D. F.—We have simply said that we don't ask for a proof, and on that we stand. I don't think there is anything further that can be reasonably asked of us. All we ask is that our statement be put in our own words. As to going beyond that statement, I entirely decline to do it, and with all deference I doubt your Lordship's power to make us say that which we have not said.

L. P.—I don't desire to make you say anything. I only want to record that you don't say it.

D. F.—We say nothing more than that we don't move for a proof.

L. P.—Then you don't ask to be allowed a proof.

L. Deas—I beg leave to say that I understand this to be the last opportunity in this Court before judgment, that the parties can have for getting a proof.

Mr Young—We can have no objection to your Lordship coming to that conclusion.

L. P.—I want to put down that you don't ask for a proof. We must have that settled before we can stir. We cannot let the case wait over.

D. F.—We have distinctly stated that we don't ask for a proof.

CALL TO THE BAR.—John Campbell Lorimer, Esq., M.A., was admitted a member of the Faculty of Advocates on December 1st.

BILL CHAMBER.—Lord Mure is Lord Ordinary on the Bills during the Christmas recess.

THE LABOURING CLASSES DWELLING-HOUSES ACT 1866 is not, as appears from a correspondence recently published in the newspapers, regarded by the Treasury as extending to Scotland, and no loans in terms of the Act will therefore be made at present by the Public Works Loan Commissioners. The Government undertakes to introduce a bill early next session to remedy the oversight. We conjecture that the hitch has arisen from sec. 2 providing that the Act "shall be incorporated with and taken as part of the 'Labouring Classes Lodging-Houses Act 1851' (14 and 15 Vict. c. 34), and the two Acts shall be read and construed together as if they were one Act.' That Act provides that nothing in it "shall extend to Scotland."

THE VALUATION ROLLS.—The Lands Valuation Act 1854 provides that the valuation rolls in Scotland shall be in the form of the schedule annexed thereto, and shall be otherwise in such form and of such dimensions as may be prescribed by the Lord Clerk Register or his deputy; and that at the expiration of every period of six years the whole rolls for Scotland, burghs as well as counties, shall be transmitted for preservation in the General Register House. The second sexennial transmission is in course of being made, and it appeared that unless some plan could be devised for lessening the size and number of the volumes, the General Register House will soon be found inadequate to contain them. A few weeks ago, some of the assessors of the leading counties and burghs inspected the building, by invitation of the Lord Clerk Register, and afterwards held a consultation, at which it was pointed out that the three columns for tenants (1st) under lease of less than 19 years' duration; (2d) between 19 and 57 years; and (3d) of 57 years and upwards—might be condensed into a single space capable of containing three figures specifying the duration of each lease. It was, however, the opinion of the meeting that the provisions of the Act of Parliament would not allow of this being done, and therefore the only means of reducing the size of the rolls was by restricting the size of the columns required by the statute. After deliberation, the assessors prepared a roll more limited in extent, and more convenient for reference. The Lord Clerk Register approved of it. It was suggested that the attention of the Lord Advocate should be called to this subject, with the view of obtaining a short Act of Parliament allowing the tenants' columns above referred to to be cancelled, and a narrow column substituted showing the duration of leases.—*Fifeshire Journal.*

ROYAL COMMISSIONS.—Lord Cranworth; Lord Westbury; Sir Hugh M'Calmont Cairns, a Judge of the Court of Appeal in Chancery; Sir James Plaisted Wilde, Judge Ordinary of the Court of Probate and Divorce; the Right Hon. Robert Lowe; Sir William Page Wood, a Vice-Chancellor; Sir George Bowyer; Sir Roundell Palmer; Sir John George Shaw Lefevre, K.C.B.; Sir Thomas Erskine May, K.C.B.; W. T. S. Daniel, Esq., Q.C.; Henry Thring, Esq., and Francis Savage Reilly, Esq., barristers-at-law, have been appointed to be Her Majesty's Commissioners to inquire into the expediency of a digest of the law, and the best means of accomplishing that object, and of otherwise exhibiting, in a compendious and accessible form, the law as embodied in judicial decisions. Mr Godfrey Lushington has been appointed Secretary to the Commission.

The Royal Commission to inquire into the state and working of the neutrality laws of this country is constituted as follows:—Lord Cranworth, chairman; Sir W. Erle, Sir Hugh Cairns, Sir R. Phillimore, Sir Roundell Palmer, Mr Vernon Harcourt, Mr Baron Bramwell, Dr Lushington, Dr Twiss, Lord Houghton, Mr T. Baring, Mr W. Forster, and Mr Gregory. Mr Gibbs, C.B., is appointed Secretary.

It is announced that Government has appointed a Commission or Committee, consisting of Sir Edward Lugard, Lord W. Paulet, Sir Henry Storks, Mr Elliott, the Secretary for the Colonies, and Mr Vernon Lushington, the Deputy Judge Advocate-General, to consider the circumstances under which martial law should be applied, and better to define the duties of the civil and military authorities in case of disturbances.

MR DENMAN, Q.C., M.P., is to bring in early next session a bill for the abolition of the Attorney's Certificate Tax.—*Solicitors' Journal.*

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Harry Davidson, Esquires, Advocates.)

FIRST DIVISION.

JENKINS *v.* MURRAY.—*Nov.* 17.

Special Jury—Right of Way.

In an action to establish a right of way at Bannockburn, in which a verdict for the pursuers was set aside as contrary to evidence, the defender's counsel moved that the second trial should proceed before a special jury; referring to the Elgin and Eaglesfield cases, *Mags. of Elgin v. Robertson*, 12*th March* 1862 : *Bell* v. *Reid*, n.r.; in the latter of which the Lord Justice-Clerk said that in a second trial as to a right of way, which relates to a burden upon heritable property, it was proper that a special jury should be allowed. *Held*, that there was no such general rule; but, in respect that the pursuers did not allege any disadvantage to them if the case were tried by a special jury, the Court granted the motion.

Act.—Millar and Mackintosh.——Alt.—Johnston.

LAMONT *v.* JOHNSTONE.—*Nov.* 20.

Bill—Leading the hand in signing.

Action of reduction of a decree of the Sheriff of Lanarkshire in an action of improbation of a bill for £50, reducing the bill as not having been truly signed by the deceased. It was proved that the hand of Mrs. Brown, the granter, who was now dead, was held by William Lamont, the son of the pursuer in this action, when her signature was attached to the bill; that William Brown, her son, was instructed by his mother to get the bill drawn out by a writer in Hamilton; that she said she had got the loan of money from the pursuer's wife, and that £50 was the sum to be put in the bill; that she had full use of her memory and all her faculties; and that she asked William Lamont to lead her hand, being herself unable, from the effects of disease, to write distinctly. *Held*, affirming judgment of Lord Kinloch, Ordinary, that, this being neither a case of diligence on a bill nor of a probative document, and Mrs Johnston having, as proved, given her authority to lead her hand in signing the bill, the obligation constituted by the bill ought to be maintained, and the interlocutors in the Inferior Court reduced.

Act.—Scott. Agent—D. F. Bridgeford, S.S.C.——Alt.—Strachan. Agent—James Renton, jun., S.S.C.

URQUHART *v.* BONNAR, *Nov.* 21.

Issue—Verdict—Fraud—Concealment.

In this case two verdicts in favour the pursuer having been set aside by the Court, a third jury nevertheless returned a similar verdict at the last

July sittings. It was an action of reduction at the instance of a shoemaker in Cupar against a doctor, and the issue was, "Whether the assignation, dated on or about the 24th May 1859, No. 6 of process, was signed by the pursuer when he was under essential error as to its nature and effect, induced through fraud and misrepresentation or undue concealment on the part of the defendor." At the third trial the jury found unanimously for the pursuer, "the assignation having been signed by the deceased John Urquhart when he was under essential error as to its nature and effect, induced through undue concealment on the part of the defender." The defender moved for absolvitor. He contended that the issue was in substance one of fraud, and could not be affirmed except by a finding of fraud. It was not alternative except in this sense, that the fraud was put in issue as committed in one of two modes—viz., (1) misrepresentation, or (2) undue concealment; and as the verdict assumed that undue concealment was a separate alternative, wholly apart from fraud, it could not be held a verdict for the pursuers. The Court refused the motion. The issue was one of essential error, and the alternative lay between essential error, induced by fraud and misrepresentation, and essential error induced by undue concealment.

Thereafter, on the motion of the pursuer, the verdict was applied, and decree of reduction pronounced,

Act.—Fraser and Campbell Smith. Agents—Macgregor and Barclay, S.S.C.——Alt.—Watson, Macdonald, and Rhind. Agent—T. Ranken, S.S.C.

STUART *v.* M'BARNET.—*Nov.* 23.

Salmon-Fishings—Title—Possession.

This case, as to a right of salmon-fishing in the Balgy, in Ross-shire, originated in an application to the Sheriff by Colonel M'Barnet, proprietor of Torridon, and others, for interdict against Sir John Stuart, one of the Vice-Chancellors of England, proprietor of the lands of Balgy, which lie on the opposite side of the said river from the lands of Torridon. This case was advocated on an order for proof, but it was superseded by an action at the instance of Stuart against M'Barnet, concluding for declarator that Stuart had sole right to fish salmon in the river, or alternatively that he had right of salmon-fishing opposite the lands of Balgy; further, that the defender had no right to fish for salmon in the said river; and prayed that he should be interdicted from so fishing. Colonel M'Barnet contended for no such exclusive right, but only that he had right to half the salmon-fishing in the river. Stuart had a Crown grant *cum piscationibus*, fortified by immemorial possession. M'Barnet had by his title right to half the "salmon-fishings" in the river, from a subject superior, which was not confirmed by or connected with a Crown grant. The proof showed that the defender's right had been exercised by rod and line, and for two seasons, in the portion of the river nearest the sea (as to which the main question was), by net and coble. There was also joint possession by persons who were tenants of both the proprietors. *Held*, that that was an avowed and ostensible exercise of the right in the titles, which was not a right that could be lost *non utendo*. The same strict rules as to the nature of possession were not to be applied where a party has a right to salmon-fishings in his titles, as are applicable where it is sought to raise a right of salmon-fishing upon

a mere title to "fishings." It was said that Colonel M'Barnet's title showed no grant from the Crown; but, however that might be in a question with the Crown, who was not appearing, and as to whom nothing was decided, there was title and possession sufficient to show that Sir John Stuart had no right to stop him. Held also, on the proof of possession, that Sir John Stuart had established his right to salmon-fishings from his own side of the stream. Expenses allowed to M'Barnet in the interdict process, and to neither party in the declarator.

Act.—D.F. Moncrieff, Young, and Gordon. Agent—James Steuart, W.S.——Alt.—Sol.-Gen. Gordon, Gifford, and Balfour. Agents—W. J. and W. H. Sands, W.S.

CUMMING *v.* BAILEY.—*Nov.* 27.

Recal of Sequestration—Antedated Bill.

The petitioning creditor in a sequestration produced as the ground of his debt a bill which, as it afterwards appeared, must have been antedated, because it was dated 17th August 1865, while the mark on the stamp on which it is written showed that it was not issued till November of that year. In a petition for recal of the sequestration this was the only ground of recal insisted on. *Held*, affirming judgment of Lord Kinloch, Ordinary, that the abstract ground on which the recal had been urged, the fact that the bill is antedated, was in itself no sufficient reason for recalling the sequestration. The petitioner did not ask for inquiry, and the question of the validity of the bill was not very much in point, for, even if it should ultimately be found invalid, that would not necessarily put an end to the sequestration.

Act.—Young and W. N. M'Laren. Agent—J. Barton, S.S.C.——Alt. —Cook and F. W. Clark. Agent—L. Mackersy, W.S.

DAVIS *v.* HEPBURN.—*Nov.* 28.

Proof—Onus—Sequestration—19 *and* 20 *Vict. c.* 79, *s.s.* 13, 30.

Question whether, where Hepburn objected to a petition for his sequestration, that he was not, as set forth by the petitioning creditor, subject to the jurisdiction, not having for some years resided in Scotland; that he was not notour bankrupt, the execution of search produced bearing to be made at a place where he was not then residing; and that he had not within a year resided or had a dwelling-house in Scotland; the *onus* lay on Hepburn to prove his objections, or on the petitioner first to prove what was necessary to support his petition, under 19 and 20 Vict. c. 79, secs. 13 and 30, not decided. The Court remitted to the Lord Ordinary to allow both parties a proof of their averments, and to each a conjunct probation.

Act.—Watson. Agents—Murdoch, Boyd, and Henderson, W.S.—— Alt.—Monro and Gifford. Agents—Duncan and Dewar, W.S.

Susp., H.M. ADVOCATE AND BARBOUR *v.* LANG.—*Nov.* 30.

Crown—Prerogative—Immunity from public burdens.

The Crown suspended a decree of the Dean of Guild Court, Glasgow, for payment of money expended under a warrant of that Court in repairing the foot pavement opposite the Barracks in Glasgow, maintaining that its prerogative

exempted it from payment of all taxes. Cases were ordered. Authorities for Respondent: R. v. Archbishop of Armagh, 8 Mod. 6; R. v. Mags. of Inverness, 18 D., p. 366; for Suspender; Bacon's Abr. v. Prerogative, 5; Adv.-Gen. v. Edinburgh Commissioners of Police, 12 D. 456; 11 and 12 Vict. c. 113; R. v. Cook, 3 T. R. 522: Att. Gen. v. Hill, 2 M. and W. 170; Trinity House v. Clark, 4 M. and S. 170; Adv. Gen. v. Garioch, 12 D. 447; Mayor of Weymouth v. Urquhart, 11 E. Jur. N.S. 466, &c. At advising,

The Lord President said—The Glasgow Police Act (25 and 25 Vict. cap. 204) provides, sec. 322, that the foot pavements of streets shall be made and repaired by the adjoining proprietors, and on their default they may be repaired at their expense at the instance of the Procurator-Fiscal. This is a very primitive mode of effecting repairs. It is, however, the rule in Glasgow. If the Act had provided for such repairs by means of a general assessment, there is no doubt that the Crown would not have been liable. It is quite settled that the Crown is not liable for any tax or impost to which it is not expressly made liable by statute. The question arises here, Whether there is any difference in the law where the obligation is laid on each party to repair the pavement opposite his own property, and where he has nothing to do with the pavements in general? This obligation is not deducible from the titles: it is imposed on proprietors by an Act of Parliament, which makes no special mention of the Crown. I do not see sufficient ground to distinguish between an Act of Parliament directing a party to repair the pavement in front of his property under the pain of having it done by another at his expense, and one which imposes a general assessment for the purpose. I think, therefore, that the Crown is not liable. There may be inconveniences arising from this view, for the statute does not provide any means for getting the repairs done otherwise; but that must be regarded simply as an omission in the Act.

Lord Curriehill, after referring to the interpretation clause and the valuation roll made up under another statute, as showing that the Crown was the party liable by the Act as proprietor of the barracks, observed that the Crown had actually made the pavement, and now objected to be held liable to repair on the ground of its prerogative of immunity from payment of taxes. There was clearly such an immunity in Scotland. His Lordship had been at some pains to find out how it had originated. He doubted whether it had belonged to the Crown of Scotland before the Union. The 42d Geo. III. c. 116 § 131 for the redemption of the Land-tax, seemed to show that the Scotch Acts imposing that tax recognised no such exemption. Undoubtedly, however, that immunity was now a part of the established prerogative of the Crown; and he had come to be of opinion that it had become attached to the Crown *by usage*. The only question at present was whether an obligation *ad factum praestandum* of this description fell under the exemption. It was not an obligation to pay money. It was argued that, on failure to perform, a party must pay the expense of having it done; so that it was really a commutation-tax. He could not take that view. It was not a commutation-tax any more than is the expense of rebuilding a church, where that has been done under the authority of the Presbytery, and the expense levied under a warrant from the heritors. Another peculiarity was that it was a duty which could alone and exclusively be performed by the proprietor of the lands and heritages adjoining, and if he did not perform it, it could be performed by

no other. His Lordship could not see on principle how the duty imposed by the Act could fall within the immunity belonging to the Crown. All the cases on that point refer to money taxes alone. If that immunity rest on usage alone, it was admitted in this case that no such usage exists. Usage has been uniformly the other way. The Crown has always, in point of fact, defrayed the expense of making streets, &c., where the obligation has been imposed on the property. It was said the Crown was not expressly named in the statute. That was another matter established as a general rule by usage; and his Lordship referred to Dwarris, p. 525, to show that it was not a very stringent rule. Besides, though not named in the Police Act, the Crown was named in the Valuation Roll, to which the Act refers for the names of proprietors. Further, the tax was imposed on the Crown by necessary implication; for, if the duty of repairing were not performed by the Crown, it could never be performed by any other party whatsoever. His Lordship therefore differed.

Lord Deas concurred with the Lord President. He could not say that all that belonged to the Crown in England belongs to the Crown in Scotland. For the Union was a union of two equal and independent States; and there would be just the same ground for saying that all that belonged to the Crown in Scotland before the Union should now belong to the Crown in England. The immunity in question had certainly been recognised since the Union by a series of decisions, and expressly in regard to local taxes in the case of the Lord Advocate v. Edinburgh Commissioners of Police, Jan. 22, 1850, 12 D. 456. There was no distinction between this case and a general assessment. The Crown was not liable for statute labour. The barrack-master was no more liable for personal service on the roads than he was to repair the pavement.

Lord Ardmillan concurred. If the question had turned on the direct right to levy an assessment on the Crown, there was abundance of authority to support a decision in favour of the Crown. There was no difference in the law as to the extent of the prerogative of the Crown in this United Kingdom. Since the Union the law must be the same in Scotland as in England. The Crown's exemption from taxation, unless it is expressly named in the Act of Parliament, or has consented to take on itself the burden, was a most valuable constitutional prerogative, because it was the true counterpart of the right of the subject to be exempted from taxation, except such as has been imposed with his own consent. It was most important to preserve this equality in our nicely-balanced Constitution.

Act.—A. R. Clark and Shand. Agents—Campbell and Smith, S.S.C. ——Alt.—Sol.-Gen. Gordon and H. J. Moncrieff. Agent—W. Waddell, W.S.

MORSON AND CO. *v.* BURNS.—*Dec.* 1.

Sale—Defect—Reference.

Waggon-builders sued a coal-agent for the price of waggons delivered. The defender ordered the waggons subject to a provision, "that in case of any dispute as to material or workmanship, the same shall be submitted to Mr Thompson, of Wishaw, who shall decide the case." They were sent from time to time up till March 1864; and from time to time the purchaser observed defects, as to which he wrote to the pursuers, but without proposing to return them, and while continuing to use them. Soon after

receiving the last two, he forwarded a cheque for £500 to the pursuers, in a letter intimating his intention to get an examination by the referee in terms of the agreement, and finding fault again with the weight and quality of the iron used for the waggons. Three days later—8th April 1864—he stopped payment of the cheque, and wrote to pursuers that the referee had reported that none of the waggons were in terms of the specification, being lighter and of an inferior quality of iron. Some communings afterwards took place with a view to a settlement, during which it appeared that the referee stated his opinion that £3, 15s. should be deducted from the price of each. No settlement, however, was eventually arranged; and this action was brought. The Lord Ordinary (Barcaple) found that the reference related only to disputes which might arise as to materials or workmanship, and did not apply to a difference as to the construction or effect of the contract, and that the defence that the submission excluded the action fell to be repelled; that the defender having taken delivery and used the waggons, he was not entitled to any deduction in respect of an award by Mr Thompson, for the reference to him in no way extended the legal rights of the parties, but merely afforded a summary mode of determining the matter of fact; and that the defender had mistaken his remedy —which was to take immediate steps for returning the waggons as disconform to order. His Lordship, therefore, repelled the defences.

The Court substantially adhered. The pursuers guaranteed the waggon springs for five years, the wheels for two years, and the general work for twelve months. If in the course of twelve months some or all of the waggons had broken down, and it had only then been discovered that the badness of the material was the real cause, the Court was not prepared to hold that the referee was not the proper party to determine what should be done. The case, however, was not in that position. The purchaser, who had all along been evidently acting in good faith, had unfortunately proceeded on a mistaken notion of his duty. It could not be held that the defects complained of were latent. They might have been discovered by examination on delivery, and the purchaser went on the assumption that he could use the waggons and still have the judgment of the referee.—[Note for reference.—Bell's Pr. 99, Com. I. 439; ed. Shaw 91; *Ransan v. Mitchell*, 7 D. 813; *Padgett v. M'Nair*, 15 D. 76.]

Act.—A. R. Clark and Lancaster. Agents—H. and A. Inglis, W.S. —*Alt.—Young and Mair. Agent—James Finlay, S.S.C.*

MORRISON AND MILNE *v.* MASSA.—*Dec.* 8.

Jurisdiction—Reconvention—Merchant Shipping Act—Arrestment ad fj.

On January 17 1866, the Scotia, of Aberdeen, came into collision with the barque Ghilino, of Genoa. Injury was done to both vessels. Morrison and Milne, owners of the Scotia, sued Francesco Massa, as master and part owner of the Ghilino, against whom arrestments were used to found jurisdiction, for damages. The summons was signeted 26th and served 27th Jan. On 27th Jan., Massa raised an action in the name of Bartolomeo, owner of the Ghilino, against Morrison and Milne, for damages for the same collision. On 1st February Morrison and Milne raised against Bartolomeo a supplementary action, which was conjoined with that against Massa. This was an objection to the jurisdiction in the first action, on

the ground that the ship was a foreign ship and Massa a foreigner. It was not now maintained that Massa was part owner of the Ghilino. The Lord Ordinary (Barcaple) sustained the jurisdiction. The defender reclaimed.

Authorities cited for Reclaimer: Bell's Com. I. 387, Pr. '500; Ersk. III. 3, 43; 17 and 18 Vict. c. 104, § 527; *Thomson* v. *Whitehead*, 22 D. 344; *Meikle* v. *Sneddon*, 24 D. 720. Authorities cited for Respondents: *Harvey* v. *Forrest*, 1 D. 1137; *White* v. *Spottiswoode*, 8 D. 952; Bell's Pr. 2226; Abbott on Shipping, 116; Story on Agency, 116; *Shields* v. *Davis*, 6 Taunt. 65; Bell's Com. I. 507.

The Lord President said—The summons is against Massa as master, and the attempt is to found jurisdiction against him, as representing the owners, by arrestment of a ship which is not his. But it is said you can't found jurisdiction against a foreigner by arresting what is not his. Morrison and Milne say the objection is not well founded on two grounds. (1) Reconvention. A question arose whether this was strictly reconvention, as there was no action by Massa when this action was raised. It is not necessary, however, to inquire critically or philologically whether reconvention is the proper name. On 26th Jan., the action was brought against Massa. Next day an action was raised by Massa and the owners of the Ghilino against Morrison and Milne for damages arising out of the same matter. The names of the owners of the Ghilino were not known when the action was raised by Morrison and Milne, but were disclosed by the second action. Thereupon, on 1st February, an action was brought by Morrison and Milne against Bartolomeo. Defences were given in by Morrison and Milne against the action by Bartolomeo and Massa. But defences were not lodged by Massa in this action till March. Therefore, by delaying, he gets Morrison and Milne to join issue in his claim, and now maintains that they are not entitled to have their claim of damages arising out of the same matter, investigated at all, because they had brought their action one day before his. That is altogether against the principle of reconvention, which is, that a party appealing to the jurisdiction of this Court makes himself also amenable to its jurisdiction, and eminently so on questions arising in regard to the same matter. It seems, on the whole, that parties are before the Court at the same moment asking it to investigate the same matter. Therefore, all parties interested are here appealing to the Court; and the subsequent repudiation by Massa in March will not relieve him from the consequences of his act on 27th January. The other answer to the objection to jurisdiction is that the original action against Massa was against him as representing the interests of the ship. It is said that this is an action against Massa as an individual. That raised a nice question; but it is not against him as an individual but as representing the ship in a matter of collision at sea. The statements are exactly what are required to make the owners liable. The Merchant Shipping Act provides, it is said, a different remedy, which is here the true remedy—viz., when a ship that is British property has been injured abroad, the foreign vessel liable therefor may be attached and detained when it is found in a British port till satisfaction is given or a security is found. Then action may be brought against the cautioner. That remedy is certainly given by the Act, but it does not interfere with the Court in considering the question whether the other remedy applies which is given by the law of Scotland. That new remedy was given, indeed, all over the king-

dom. There are no words of limitation; but it does not follow that we have not still our own remedies in Scotland. In England, there was no way of getting at foreign owners, and it was necessary to find a substitute; but the action against foreign owners was always competent here, and our former remedy is not superseded. The action by Bartolomeo and Massa, brought the next day after this, is not alleged to be founded on a mandate in favour of Massa. He does it simply in virtue of his position as master representing owners. Is he to be good to sue without a mandate, but not to defend?

The other Judges gave opinions differing in various degrees as to the grounds of judgment, but concurring in sustaining the jurisdiction.

Act.—Young and Millar. Agent—John Henry, S.S.C.——Alt.—Gifford and Asher. Agents—Murdoch, Boyd, and Henderson, W.S.

Pet., BRODIE OR MACKENZIE.—*Dec.* 12.

Petition—Tutor Nominate—Special Powers—Sale of Heritage.

A mother, as tutor-nominate, petitioned for authority to sell heritable subjects by public roup, and to ordain the sum to be realised, after deducting expenses, to be reinvested in the name of the petitioner, or of such other person, and on such conditions, as should seem proper, for securing the interests of the pupils and the heirs entitled to succeed to them, in the event of their dying in pupillarity. The heritable subjects consisted of a house and garden. The house required to be rebuilt, or undergo thorough repair. The pupils were unable to repair it without borrowing on the security of the house, having no income whatever except the rents of the house, and their mother being poor. The petitioner suggested that the money might be left in the hands of the tutor nominate, as was done in Bellamy, 17 D. 115, and Mackenzie, 17 D. 314, or that a *curator bonis* might be appointed by the Court in the present petition, as was done in Sawers, 12 D. 905. Every case on the subject was cited to the Court. The Court was of opinion that the petitioner ought to have a *curator bonis* appointed, in whose name the price of the property might be invested, and that that should be done in a separate petition. That being done, there was a case upon the merits to justify the Court in granting the prayer.

Act.—Birnie. Agents—G. and J. Binny, W.S.

BEATTIE *v.* BEATTIE.—*Dec.* 15.

Marriage—Adulterers—St. 1600 *c.* 20*—Legitimacy—Foreign.*

Reduction of services expede by the defender, as heir of provision of Francis Beattie, senior, who died in 1837, leaving a trust-settlement. By this he conveyed his heritable property to Francis Beattie, his youngest lawful son then alive, and to his children lawfully procreated; whom failing, to Thomas Clark Beattie, his grandson, and his children lawfully procreated. The defender is the lawful daughter of Thomas Clark Beattie. The pursuers claimed to be the lawful children of Francis Beattie, junior, by a marriage between him and Jane Pringle, and so called as heirs of provision before the defender. The summons also contained conclusions making it in effect a declarator of legitimacy. A preliminary defence was stated, objecting to the title to pursue, on the ground of the pursuer's ille-

gitimacy. A record was made up, and a proof taken, as in consistorial cases.

The pursuers contended that the father and mother (Jane Pringle) married at Gretna Green, 11th November 1813, that, after living for some time at Carlisle, they went to Canada, where, on 26th October 1822, they were formally married at Montreal by the Rev. John Bethune, Rector and Dean of Montreal. The defenders contended that the marriage at Gretna, as well as that in Canada, were null, as having taken place while Jane Pringle was the wife of James Crombie, from whom she eloped with Francis Beattie. Her marriage with Crombie was alleged to have taken place on 26th November 1805. Crombie died 24th July 1823; having obtained a decree of divorce against Jane Pringle in the Commissary Court of Edinburgh, on 16th July 1819. This decree of divorce was not recovered; but its terms were proved by a duplicate in the Commissary Court Books, marked by the initials of the Commissary. It contained the name of Francis Beattie, as the party with whom the defender in the process of divorce had committed adultery.

It was proved that, by the law of Canada, adulterers cannot afterwards marry. Mr Popham being asked—"Is it not a rule of Lower Canada law that parties who have committed adultery together can never lawfully marry each other?"—replied, "Yes; if they have knowingly committed adultery with each other." Mr Mackay, in like manner, stated—"Two persons, wilful knowing adulterers, can never marry together lawfully in Lower Canada."

The Lord Ordinary held the marriage invalid, sustained the objection to the title to pursue, and dismissed the action. His Lordship observed that there had been an entire failure to prove Francis Beattie's ignorance. The contrary was the fair inference from the proof. Jane Pringle had in 1813 been more than eight years married to Crombie, and had lived with him, and been known as his wife. She was living in Dumfries, under the name of Mrs Crombie, with her husband coming to her regularly every Saturday, his work lying at some distance. She had children by Crombie living with her. Her acquaintance with Francis Beattie seems to have been commenced by her getting employment in binding hats for the hat manufactory carried on by Beattie's father; and there is no reason to doubt that she got this employment under the married name by which she was then known. It was impossible to suppose that he did not know her true position. But had the law of Canada been different, the Lord Ordinary would not have held the marriage valid. The question was raised in the Supreme Court of Scotland. And although, in questions of *status*, international law requires that respect be paid to the law of the domicile, the principle does not hold where the law sought to be applied is at variance with that of the tribunal of decision, in regard to a fundamental point of national policy, or general morality. (Fenton *v.* Livingstone, 3 Macq. 397.) The Act 1600, c. 20, struck directly at the case. And whatever might have been the law of Canada, the Lord Ordinary would have been compelled to hold the marriage in Montreal invalid, and the pursuers illegitimate, especially as this was an action for enforcing a claim to heritable property in Scotland.

The pursuers reclaimed. At advising,

The Lord President said—The first question was whether Jane Pringle was the wife of Crombie. And as to this he could have no doubt—the

proceedings in a prosecution at the instance of the Procurator-Fiscal against Crombie for a clandestine marriage with her, in which they compeared and judicially acknowledged the clandestine marriage, being in evidence. Neither could there be doubt as to the identity of the parties both in the question as to the elopement and decree of divorce in which Beattie's name appears. Then it was clear that these persons could not intermarry in Scotland. His Lordship, however, did not adopt the proposition that the Scotch law could not recognize the Canadian marriage, even if lawful in Canada, on the principle established in Fenton *v.* Livingstone. A marriage between them in Scotland would have been null, because Beattie's name was in the decree of divorce, and therefore came within the statutory provision. But apart from that statute, his Lordship did not think a marriage between adulterers (after the dissolution of the prior marriage) either illegal or immoral in the eye of the law of Scotland. The fact of the marriage ceremony in Canada being established, the question arose, could that be a lawful marriage in Canada? Mr Popham's evidence was very clear in the negative. The other witness was more fastidious in giving his evidence. But he comes to substantially the same thing, only making great allowance for the ignorance of one party, and the constitution thereby of a putative marriage valid to certain effects in consequence of *bona fides*. Mr Popham said a marriage between two who had "knowingly" committed adultery was bad. Mr Mackay used the words "knowingly and wilfully." His Lordship could not see that there was really any distinction between committing adultery "knowingly" and committing it "knowingly and wilfully." Upon the question of fact whether Francis Beattie did know that Jane Pringle was married to another, the evidence was reviewed by his Lordship nearly in the same terms as was done by the Lord Ordinary, and to the same effect. It was a thing to be proved by circumstantial evidence, and the case was as clear as could well be—clear enough to have established a criminal charge against Beattie if we were now in the habit in Scotland of prosecuting adulterers criminally.

Lord Curriehill and Lord Ardmillan concurred.

Lord Deas also concurred, observing that it was not necessary to decide the question that would arise if the Canadian marriage had been valid. That question was not solved by the principle of Fenton *v.* Livingstone. His Lordship thought the marriage was not contrary to morality or the policy of the law of Scotland; and the question would have had to be settled upon narrower considerations.

The Court adhered to the Lord Ordinary's interlocutor, dismissing the action.

Act.—Fraser, Scott, and Brand. Agent—John Walls, S.S.C.——Alt —Sol.-Gen., Pattison, and A. Blair. Agent—John M'Cracken, S.S.C.

TAYLOR *v.* CRAIG.—*Dec.* 20.

Expenses—Slander.

This case was tried upon an issue, proceeding on the admission of a letter from the defender to the pursuer in the following terms:—"Just as I expected, *your orders plentiful*, your money *nowhere;* but there are too many of this class in your town particularly—please try elsewhere; but friends in my way of business in this town will have the opportunity of reading your

communications. I cannot say I wish you better fortune elsewhere, because I believe your system should be put a stop to.—Yours, &c.," and asking "Whether it was of and concerning the pursuer, and falsely and calumniously represented him as a dishonest person, &c."

The jury found for the pursuer, damages one farthing. The Lord Ordinary (Ormidale) found that the case fell under the general rule that a pursuer of an action for slander, who has obtained a verdict for nominal damages, is entitled to expenses—(1) Because the slander here was of a very serious description; (2) The jury found the slander to be false and calumnious, and to the loss, injury, and damage of the pursuer; (3) The defender made no apology; (4) While nominal damages may have been given, in consequence of no publication having been proved, it was important for the pursuer to have the serious charge negatived, more especially as the letter contained a threat to make known the matter to friends in the same line of business in Liverpool. The defender reclaimed, and contended that this case was exceptional. The letter never having been communicated, there was no defamation, but the damages sought were only for injury to feelings (Lovi *v.* Wood, Hume, 613; Ewing *v.* E. of Mar, 14 D. 314, 330); and the pursuer sought for £500, and got only a farthing, which showed that the jury thought that, if he was not so bad as the defender had said, he was very nearly so. (Mason *v.* Tait, 13 D. 1282; Duncan, 22 D. 934.)

The Court, without calling on counsel for the pursuer, adhered.

Act.—Sol.-Gen. and Shand. Agents—Messrs J. W. and J. Mackenzie, W.S.——Alt.—A. R. Clark and Rhind. Agent—R. P. Stevenson, S.S.C.

Pet., FLETCHER AND ANOTHER.—*Dec.* 11.

Entail—Registers—Warrant to transmit recorded deed.

The petitioners were heirs under two deeds of entail, the one executed in 1759; and the other, corroboration of the first, in 1804. These deeds were both in the Books of Council and Session. The petition was addressed to the Lords of Council and Session, and came before the Junior Lord Ordinary. The prayer was "to grant warrant to the Lord Clerk-Register, and other Keepers of the Records, to transmit the two principal dispositions and deeds of entail to the clerk of this application, or to appear before your Lordships, and to exhibit the same, and, upon the same being produced or exhibited as aforesaid, to interpone your authority to the said disposition and deeds of entail, and to grant warrant to the Keeper of the Register of Tailzies for recording the same agreeably to the Act of Parliament 1685, cap. 22." The Lord Ordinary reported the matter verbally. The petitioners founded upon A.S., 24th December 1838, sec. 15, as showing that the Lord Ordinary had power to grant the warrant. The Court held that the proceeding should be under the authority of the Inner House, and directed the Lord Ordinary to frame an interlocutor proceeding upon that authority, and providing that the documents should always remain in public custody, and should be retransmitted to the Keepers of the Records as soon as they were recorded in the Register of Tailzies. *Act.—Sol.-Gen. and Shand.*

SECOND DIVISION.

Beattie (Inspector of Barony Parish of Glasgow) *v.* **Adamson** (Inspector of City Parish.)—*Nov.* 23.

Poor—Settlement—Pupil child.

Clark, an able-bodied man, had in 1854 a residential settlement in the parish of C. This settlement he lost by non-residence in 1859. In 1856 he deserted his family, who were relieved by the parish of B. In 1857 he returned, and repaid the sums expended in relief of three of his children; but with regard to his remaining child, Elizabeth, the subject of the present action, who had been admitted into the poorhouse of B., he neither paid for nor removed her. Elizabeth was then in pupillarity, and has admittedly always been in weak health. She has since remained and is now in the poorhouse of B., by which parish the statutory notice was in 1863 sent to the parish of C., on the assumption that it was the parish of her settlement. It was admitted on the part of C. that Elizabeth, in respect of her health, was all along a proper object of parochial relief.

The Court (rev. judgm. of Sheriffs of Lanarkshire and of Lord Barcaple) *held*, that by C.'s admission the pauper was from 1856 downwards a proper object of parochial relief, that is a person entitled to demand such relief. Her father being an able-bodied man, she could not have been so unless there were something exceptional in her case, as doubtless would have been proved to be the fact, but for C.'s admission, which rendered such proof unnecessary. Her father's and therefore her own settlement in 1856 was in the parish of C. This settlement, though acquired through her father, was acquired in her own right, and no loss by the father of that settlement could affect the settlement which the child had so acquired. If the father had become chargeable in 1856, subsequent absence from the parish would not have altered his settlement, unless and until he was rehabilitated. The case of a child was precisely analogous. In all cases, when a person became a pauper, his *then* settlement fixed the liability.

Lord **Cowan** dissented. Advances made to an unemancipated child and in her own right could not be made the subject of a legal claim. Assuming the child to be a lunatic pauper, and therefore a burden on her father's settlement, such burden ought to be laid, not on the residential settlement, which he had lost, but on his birth settlement. The admission, though incautiously worded, meant only that the health of Elizabeth was such as would have made her a fit object of parochial relief, apart from the specialty of her having an able-bodied father.

Alt. Fraser & Burnet. Agent—John Thomson, S.S.C.——Alt.—Advocatus, W. M. Thomson. Agent—W. Burnett, S.S.C.

App. W. D. Hall and Others.—*Nov.* 24.

Sequestration—Personal Protection—Appeal—Competency—19 & 20 Vict. c. 79, § 169.

At a meeting of his creditors, personal protection was by the vote of a majority refused to the bankrupt. Against this resolution the minority appealed. The prayer of the appeal, which purported to be under sec. 169

of the Bankruptcy Act, simply requested the resolution to be recalled on the ground that it had been carried by fictitious votes. The Court remitted to the Sheriff to dismiss the appeal as incompetent. All that the prayer asked was to recal a negative, which could end in nothing, and do no good to the bankrupt. The proper course would have been to protest at the meeting that the resolution was not carried, and then in the appeal to ask this to be found. Lord Benholme dissented. He thought no particular form of prayer was necessary, and that sufficient materials were before the Court to enable it to do substantial justice in the case.

Act.—Millar, W. M. Thomson. Agent—J. Ross, S.S.C.——Alt.—Decanus & Rhind. Agent—R. P. Stevenson, S.S.C.

DUKE OF BUCCLEUCH *v.* COWAN BROTHERS.—*Nov.* 28.

Jury Trial—Special Jury—Motion to quash verdict—Competency.

A motion was made in this case to have the whole proceedings at the jury trial, which took place in August last before a special jury, quashed and set aside, as having taken place before an illegal tribunal; the allegation being that the jury had not been properly struck. The Sol.-Gen., for the pursuers, opposed the motion (1) as incompetent; (2) on its merits. The Court on the former ground refused the motion. After a verdict was returned, there was no way of setting it aside except by the means prescribed by statute and regulated by Act of Sederunt; these were (1) by a bill of exceptions; (2) by a motion for a new trial. The present application was unauthorised by statute, and unknown in practice. Being, therefore, quite irregular, the Court could pronounce no deliverance upon it.

BURNET *v.* HENRY.—*Nov.* 30.

8 *Vic. c.* 19, § 32—*Arbiter's Clerk—Expenses.*

The dispute was whether the pursuer, or defender as representing the Glasgow Corporation Water-works Commissioners,—who had constructed certain works through lands the minerals in which belonged to the pursuer —was bound to pay the one-half of an account due to Traquair, as clerk to arbiters under the Lands Clauses Consolidation (Scotland) Act, 1845. Sec. 32 of that Act enacts that "all the expenses of any such arbitration and incident thereto, to be settled by the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking, unless the arbiters or oversman shall award the same sum as, or a less sum than, shall have been offered by the promoters of the undertaking, in which case each party shall bear his own expenses incident to the arbitration; and in all cases the expenses of the arbiters or oversman, as the case may be, shall be borne by the promoters of the undertaking."

In this case the arbiters, after investigating the claim, had awarded the pursuer nothing. The Court (reversing the interlocutor of Lord Ormidale) assoilzied the defender. The section of the Act divided the expenses into three classes—(1) those of the promoters (2) those of the claimant, and (3) those of the arbiters. The statute did not contemplate that there should be a clerk to a submission under it, but if a clerk was employed his account

fell under the third class, which in all cases fell to be paid by the promoters.

Act.—Young & Burnet. Agent—J. Thomson, S.S.C.——Alt.—Clark & Johnstone. Agent—J. Padon, S.S.C.

GIBSON *v* MACQUEEN.—*Dec.* 5.

Reparation—Process—Action by several Pursuers—Competency.

This was an action of damages against a law agent on the ground *inter alia* that he, acting for the debtor, had delivered two bonds to the creditors in them, knowing that certain signatures to these bonds were forged. There were four pursuers, two of whom were creditors in one bond for L.1200, and the other two in a bond for L.300. The security was over the same subjects, and the creditors in each bond were to rank *pari passu*. The summons concluded for a slump sum of L.840. The Court dismissed the action as incompetently laid. There were here two sets of pursuers with no community of interest—nay, whose interests might at any time become adverse. Their respective claims might come to depend upon quite different grounds; the one might succeed and the other fail; and yet they had no mode, nor any clue to a mode, of ascertaining what amount of interest each set of pursuers had in the sum concluded for.

Act.—Fraser & Scott. Agents—Murray, Beith, & Murray, W.S.—— Alt.—Advocatus, & W. N. M'Laren. Agent—J. M. Macqueen, S.S.C.

MORRIS *v.* BICKETT.

Appeal—Application of Judgment.

A judgment of the Court of Session was affirmed *simpliciter* by the House of Lords. The pursuer (respondent in the appeal) petitioned the Court (1) to apply the judgment of the House of Lords; (2.) for warrant to deliver up the bond of caution which had been deposited on payment of the expenses under an interim execution granted by the Court of Session pending the appeal. The Court refused the petition as unnecessary and incompetent. The first prayer was, in the case of a simple affirmance, unnecessary; and the bond of caution was an obligation to repeat the expenses in the event of a reversal, which had not and could not now occur.

Alt.—Orr Paterson. Agents—Duncan & Dewar, W.S.——Alt.—A. Blair. Agents—Hunter Blair & Cowan, W.S.

RHIND'S TRUSTEES *v.* GUNN AND OTHERS.—*Dec.* 7.

Trust Deed—Legacy—Vesting—Conditio si sine liberis.

Alexander Rhind died on 3d July 1863. Under his trust disposition and settlement (dated 1st January 1861) he bequeathed a legacy of L.2000 to his aunt, Mrs Gunn, and failing her by death, and in the event of her leaving lawful children, he directed his trustees to divide the legacy equally among these children. Mrs Gunn died in February 1862. One of her daughters, Mrs Leith, died in 1855, leaving children. They, in right of their mother, and as grandchildren of Mrs Gunn, claim a proportional share of the L.2000 with the other children of Mrs Gunn who still survive. The Court, adhering to the judgment of the Lord Ordinary (Ormidale) repelled their claim.

The legacy could not have vested in the mother of the claimants, and therefore no part of it devolved on them *jure representationis*. Further, the maxim *si sine liberis* did not apply. The claimants' mother having died long before the truster made his settlement, there was no ground for holding that he included or intended to include her among the children of his aunt. There was no averment that the truster, when he made his settlement, was ignorant of the fact that the claimants' mother was dead.

Act.—Young & Lee. Agent—H. W. Cornillon, S.S.C.——Alt.—Sol.-Gen. and Hunter. Agents—Morton, Whitehead, & Greig, W.S.

Petitioner—WILLIAMS.—Nov. 23.

Petition—Judicial Factor.—19 and 20 Vict. c. 79 § 164.

A petition for a judicial factor was brought under section 164 of the Bankruptcy Act, by an heritable creditor of a deceased person. There were no representatives with an active title. No information was given as to the indebtedness of the estate or the parties interested. The moveable estate was *ex facie* sufficient to satisfy the petitioner's claim. The petition was reported verbally by Lord Mure, and the Court in the exercise of their discretion refused the application.

LORD ADVOCATE *v.* EARL OF FIFE.—*Dec.* 11.

Exchequer—Succession Duty—Deductions—16 *and* 17 *Vict. c.* 51, § 34—*Date of Succession.*

In 1864, an information was laid by the Lord Advocate against the fifth Earl of Fife—the question then raised being whether he was liable to succession-duty under section 2 of the Act. The Lord Ordinary (Ormidale) held that he was, and that judgment was acquiesced in. The question now before the Court is as to the amount of the duty. The rental of the estate amounted to L.29,767, 18s. 7d. On the part of the Crown, it is admitted that deduction must be made of L.6983, 14s., the amount of the annual interest at the rate of five per cent. on a debt of L.139,674, 0s. 2d., due by the trust-estate when the succession opened to the Earl. Over and above this sum, the Earl claims a deduction of L.4441, 1s. 5d. of premiums of insurance payable by him on policies which he obtained on his life to enable him to relieve the trust-estate of the above sum of L.139,674, 0s. 2d., leaving it a burden upon his life-interest in the estates. The Lord Ordinary (Ormidale) held that he was not entitled to such deduction. A further question was raised as to what was to be taken as the Earl's age at the date of his succession—whether forty-two or forty-three. This turned upon whether the date when the succession opened to the Earl, or the date when he actually obtained possession under a title—viz., the date when the deed of denuding was executed by the trustees in his favour—was to be held to be the regulating date. The Lord Ordinary held the former, and that the Earl's age was therefore forty-two. The Earl reclaimed, but the Court adhered.

Act.—Advocatus, Rutherfurd. Agent—Solicitor of Inland Revenue. Alt.—Young, Clark. Agents—H. and A. Inglis, W.S.

MRS HARTLEY OR NOLAN *v.* HARTLEY'S TRUSTEES—*Dec.* 12.

Trust-Deed—Codicil—Construction—Vesting.

By trust-deed of 26th December 1833, the deceased Mrs Hartley directed her trustees "immediately after my death, or so soon thereafter as the same can be advantageously effected, to sell and dispose of, and realise my whole heritable and movable property;" and she proceeded to declare, "I hereby direct and appoint my said trustees and their foresaids to apportion and divide my trust-estate when so realised (after deduction of the provisions under the first condition of this trust) equally among my five grandsons," whose names and designations then follow; and the truster then goes on to say that they are to receive the property "share and share alike, upon their respectively attaining majority, or twenty-one years complete; declaring that, in the event of any of my said grandsons dying without leaving lawful issue of their own bodies, such deceaser's share shall be equally divided among the survivors; but if the deceaser shall leave lawful issue of his body, such issue shall be entitled to their parents' share of my said trust-estate; declaring farther, that in the event of any of my said grandchildren, or their issue, being under age at the period of my said trustees realising and finally winding up my said trust-estate, then, and in that event, my said trustees shall set apart the share of such child or children under age until he or they shall have attained majority, my said trustees having full power either to advance or accumulate the interest during such minority as they may see expedient and proper." By an after-clause she instructed her trustees "to let my dwelling-house at such rent as they may think proper, until it can be advantageously sold, dividing the free rent obtained therefor among my said grandsons and their foresaids equally, share and share alike;" and by her codicil of 18th April 1834, Mrs Hartley recalled and altered her settlement to the following effect:—"I do hereby give, grant, and dispone to my daughter all and whole my dwelling-house and pertinents . . . . in liferent, for her liferent use allenarly, and to my within-written trustees, for the special ends, uses, and purposes within mentioned, in fee; it being my wish and intention that my said daughter shall have the liferent use of my said dwelling-house and furniture, &c., if she survives me, and that at her death the whole shall be realised, along with the remainder of my trust effects, and divided among my five grandsons within named, in manner particularly within directed; and in so far as not expressly and effectually altered by this codicil, or these presents, I do hereby ratify, approve, and confirm the within-written trust-disposition and deed of settlement."

The Lord Ordinary found that, according to the sound construction of the trust-disposition and codicil, the right thereby given to the grandchildren of the testatrix and their issue did not vest till the death of her daughter, the pursuer, and that all the said grandchildren and their issue being dead, the right to the whole property, heritable and movable, belonging to the said testatrix, was now vested in the pursuer, her only child and heir-at-law.

To-day the Court by a majority adhered. They thought that the effect of the codicil was to remove the *punctum temporis* at which vesting took place in the grandsons to the death of the liferentrix. The settlement was

framed from the first on the footing that a realisation and division indicated the time of vesting. No doubt the testatrix did not contemplate that her grandsons would all die in the interval, but this could not affect the meaning of the terms employed.

Lord Neaves differed. He thought the Court were giving an effect and importance to the codicil as overruling the principal deed, which was never contemplated by the testatrix, and was not fairly deducible from its own terms.

Counsel for Reclaimer—Monro, Gibson. Agents—William Mitchell, S.S.C.——Counsel for Hartley's Trustees—Skelton. Agents—Tods, Murray, and Jamieson, W.S.——Counsel for Pursuer—Young, Duncan. Agent——— Walker, W.S.

M'EWAN *v.* MIDDLETON—*Dec.* 14.

Retention—Partnership Creditor—Partner's Debtor—Liquid Counter-Claims.

The parties in this case were calenderers in Glasgow. Under their contract of copartnery, all disputes were to be referred to an arbiter. After the business had gone on for about three years, M'Ewan had recourse to the arbiter, and the latter found that Middleton was insolvent, in the sense of the contract. M'Ewan thereupon elected to take over the whole business and estate of the company, having power to do so under a clause in the contract. Middleton's share in the concern was estimated by the arbiter at L.406, 1s. 1d., and this sum M'Ewan was ordained to pay him. On the other hand, it appeared that Middleton was proprietor of the tenement in part of which the business was carried on. The company acted as factors for this property, and kept a separate account for it called the property account. Middleton's debit on that account amounted to L.968, 6s. The arbiter had no power under the submission to deal with this account—Middleton having charged M'Ewan for the sum awarded to him. M'Ewan brought a suspension of the charge, and pleaded that he was entitled to set off the sum at Middleton's debit on the property account against the sum awarded to Middleton.

Lord Kinloch refused the suspension; but the Court unanimously recalled that interlocutor. They held the case to be one not of compensation but of retention. The arbiter had rightly not set off the debt due by the charger to the company against the sum to which he was found entitled under the decree-arbitral; but in the suspension, M'Ewan was quite entitled to *retain* the sum ascertained to be due to him on the property account as against the sum awarded against him. His plea to that effect was, accordingly, sustained.

Act.—Shand, Maclean. Agent—J. Ross, S.S.C.——Alt.—Clark, Asher. Agents—Maconochie & Hare, W.S.

QUEEN *v.* BEATTIE—*Dec.* 18.

Exchequer—Quarter Sessions—Special Case—6 Geo. IV., c. 81, § 26.

This was a case stated by the Quarter-Sessions of Perthshire for the opinion of the Court. It was presented in terms of the 84th section of the General Excise Act (7 and 8 Geo. IV., c. 53). The import of the facts

which the Sessions held as proved is as follows:—The defender keeps a temperance hotel in Blairgowrie, and has accommodation for lodgers. An excise officer, acting under instructions, entered the hotel, and asked the defendant's wife, in his absence, for a bottle of bitter beer. The wife, unknown to the officer, sent her servant to a trader. The servant bought and paid for the beer. The bottle was uncorked by the wife, and by her given to the excise officer, who paid for it and drank part of it. Three of the justices held that these proved facts amounted to a sale of the beer, and that the defendant had, through his wife, contravened the statute (6 Geo. IV., c. 81, sec. 26). The other three were of opinion that there was no sale.

The Court were of opinion that, on the facts, there was no legal ground for a conviction. That there had been a double sale they had no doubt. Whether it was a sale by retail was not so clear. The ordinary meaning of that phrase was a sale by small quantities of a commodity of which the seller had a large stock. That was not the case here disclosed. At the same time, had it been necessary to decide this point, they would have had some difficulty, for the word "retail," as defined in certain of the Excise statutes, seemed to apply to any sale of liquor provided it did not amount to a certain specified quantity. They were, however, in a position to express an opinion for the direction of the justices on other grounds, for the section of the statute which the defender was said to have contravened referred to the case of persons who regularly traded in the articles there enumerated, and who, if they did not take out the proper licence, would forfeit a certain penalty. Such was not the case of the defender. The act with which he was charged was an isolated one. No doubt a single act of sale might from attending circumstances infer a constant traffic. There were no such circumstances here. The sale was made by a person who not only kept no stock on hand, but openly professed that he did not; and it was, further, not unimportant that the transaction was not attended with profit. Expenses were asked by the defender, but the Court held that they had no power to deal with that question.

Act.—Advocatus, Solicitor-General, Rutherfurd. Agent—Solicitor for Inland Revenue.——Alt. Fraser, Campbell. Agent—J. Galletly, S.S.C.

TEIND COURT.

MINISTER OF KILBIRNIE *v.* HERITORS.—*Dec.* 19.

The minister of Kilbirnie applied for an augmentation of twelve chaldera. The last augmentation was in 1815. The Earl of Glasgow and other heritors objected that there was no free teind. The question was, whether a decree of valuation of the teinds of the Barony of Kilbirnie was a valid decree. The minister maintained that it was not, as it appeared *ex facie* of it that the minister had not been called as a party to the valuation (Kirkwood *v.* Grant, Nov. 7, 1865, 4 Macph. 4.)

The Lord President said—This is a question of expediency and justice

rather than of strict law. An augmentation is asked, and the question whether it should be granted depends on whether there is a good valuation. I don't mean to say that the production of a decree of valuation is in every case to stop a minister from getting an augmentation. But if a decree is produced which has a certain sanction, then the matter may demand further investigation. Here the decree received effect in the previous augmentation in 1815. It was then produced, and no objection to it taken. It has been acquiesced in during the subsequent fifty years, although the smallness of the stipend was a very strong inducement to bring an augmentation. The question now is where and how the further discussion which is necessary shall take place. If we grant the augmentation, the result is that the heritor may be compelled to pay, for perhaps a series of years, on an interim scheme of locality, to which he has had no opportunity of objecting. If, on the final scheme, it should be held that the decree of valuation is good, there would be no augmentation. Looking to the circumstances of the case, his Lordship was of opinion that the best course was to sist procedure, until the minister should bring an action of declarator to ascertain the validity of the valuation. He would still have the benefit of the date of this process.

The Lord Justice-Clerk concurred, but could not but express his regret that there was no means of trying such a question in an augmentation. It was competent, his Lordship thought, to grant an augmentation conditionally, and remit to the Lord Ordinary to ascertain, before proceeding in the locality, whether there was free teind. If not competent, there was no reason in any Act of Parliament why it should not be made competent by Act of Sederunt. It would greatly simplify and cheapen the procedure. Yet his Lordship did not regret in the present case that such a course could not be adopted, because the incumbent in 1815 having been satisfied with the decree of valuation, and his successors ever since having acquiesced in it, there was no great hardship in requiring the minister to make his case clear by another process.

The other Judges concurred.

Act.—Pyper. Agent—J. Gillespie, W.S.——Alt.—A. R. Clark and Marshall. Agents—Tods, Murray, and Jamieson, W.S.

HIGH COURT OF JUSTICIARY.

PITCAITHLY *v.* TAY DISTRICT BOARD.—*April* 25.

Salmon Fisheries Act—Bye-law.

Commissioners under the Salmon Fisheries Act having found that a bye-law fixing the commencement of the annual close time was informal and invalid, made a new bye-law. *Held*, that the Commissioners had not exhausted their powers by making the first bye-law, and that the close time was determined by the second bye-law.

H.M. Adv. *v.* Mackay.—*Nov.* 26.

(Full Bench.)

Fraudulent Bankruptcy—Jurisdiction—Perjury.

Certified from Jedburgh Circuit. Panel was charged with fraudulent concealment and clandestine away-putting of property by a bankrupt, and perjury. The facts set forth were, that he had concealed the existence of two sums in bank in Liverpool, one deposited in his own name, and the other in name of his wife; that, having concealed the existence of these sums, he went to Liverpool, drew them out, and fraudulently concealed and put away the same from the trustee and creditors; and that, having returned to Scotland, he took the statutory oath that he had made a full disclosure, whereas, in fact, he had not done so; and that he had not delivered up all the books and documents belonging to him.

Objections—That the uplifting of the money from the bank did not amount to the crime of away-putting; that the offence, or an essential part of it, having taken place in England, did not come within the jurisdiction of the Court; and that in the charge of perjury, so far as it referred to the concealment of books and documents, the prosecutor ought to have averred the existence of books and documents, and specified those that were concealed,—*repelled;* but prosecutor recommended to withdraw the charge of perjury so far as relative to books and documents.

Act.—Sol.-Gen. and Blackburn.——Alt.—Campbell Smith.

M'Nab *v.* Stewart.

Master and Apprentice—4 Geo. IV. c. 34.

In August last, Stewart, a partner of Stewart & Mackenzie, millwrights, presented a complaint against M'Nab, an apprentice of the firm, to the Justices of Renfrewshire, under 4 Geo. IV., cap. 33, sec. 1. The complaint libelled the indenture, and stated that, on certain days, and while employed on certain work, "he had frequently been guilty of misconduct or ill-behaviour by idling away his time, and refusing or failing to perform a proper and sufficient quantity of work and labour."

The oath of the complainer having been taken, warrant was granted to apprehend M'Nab, and he was apprehended in the workshop. He pleaded not guilty, and proof having been led for the complainer, the Justices found him guilty in terms of the complaint, and sentenced him to forty days' imprisonment with hard labour.

The suspender pleaded that no *species facti* had been averred which came up to the statutory charge. 2. That the Act did not grant the power of apprehension, except when the apprentice had absconded. 3. Oppression. 4. That the complaint ought to have been at the instance of the firm, and not of an individual partner. 5. That the conviction was of two alternative offences, misconduct or ill-behaviour. Reasons of suspension *repelled.*

Act.—Hall. Agent—M. Lawson, S.S.C.——Alt.—A. R. Clark and Crawford. Agent—J. Martin, W.S.

LAIDLAW *v.* SHARKEY.

Master and Workman—4 Geo. IV. c. 34.—*Computation of Time*—*Expenses*—*Summary Procedure Act.*

The suspender was convicted, on 13th September last, before two Lanarkshire Justices of Peace, on a complaint at the instance of the manager for Borron & Co., bottle manufacturers, Glasgow. The complaint was presented on 17th August 1866, under the Summary Procedure Act, and 3d and 4th Geo III., c. 34, and charged the suspender, who was engaged to serve the said firm for a year from 18th February 1865, with absenting himself, on or about 21st August 1865, from the said service, and ever since continuing absent therefrom in places in Ireland and elsewhere furth of Scotland unknown to the respondent. The grounds of suspension were, that the complaint was not brought within six months "from the time when the matter of such complaint arose," as required by sec. 24 of the Summary Procedure Act. The *terminus a quo* was 21st August; but even if it should be held to be 17th February 1866, when the contract expired, the 17th August was six months and one day after that. The respondent argued that the continued absence from 21st August to 18th February, when the contract expired, was one offence; and the delay in bringing the complaint arose from the suspender's absence in "places unknown" to the respondent.

Observed, per Inglis J. C., that the respondent could have got a warrant for the suspender's apprehension immediately on the suspender's absenting himself, and have made use of it when he came back or was found. *Held* that the limitation in the Summary Procedure Act applied, although there was none in the Master and Workman Act; and that the matter of complaint arose when the workman absented himself. Bill passed with modified expenses. Objection that no expenses should be allowed, in respect that the objection had not been stated in the inferior Court—*repelled*. *Act.*—*Mair & Finlayson. Agent*—*M. Lawson, S S.C.*——*Alt.*—*Young and Watson. Agents*—*Gibson-Craig, Dalziel, & Brodie, W.S.*

CIRCUIT COURT.

SCOTTISH NORTH EASTERN RAILWAY *v.* CARGILL.—(Dundee, Sept. 13.)

Small Debt Summons—*Competency of Appeal.*

The account sued upon (for stooks burned by engine sparks, and sheep killed by a train) did not state that the pursuer's loss had been caused by the negligence or fault of the Company. Appeal by the Railway Company, on the ground of deviation from the statutory requirements, preventing substantial justice from being done, dismissed.

H. M. ADVOCATE *v.* STEWART.—(Ayr, Sept. 11).

Res Judicata—*Assault*—*Murder*—*Declaration.*

Stewart was indicted for the murder of his wife. It was pleaded in bar of trial that he had been tried before a J. P. Court on a complaint for assault, setting forth nearly the same *species facti* as the indictment; that

he had pleaded guilty, and been sentenced to thirty days' imprisonment, which sentence had been carried into effect; that the fact of death emerging was not such an addition to the *species facti* as to elide the plea of *res judicata*; that the case of *Cobb*, 1 Swin. 354, was exceptional, and not sufficient to overturn the rule that no man should "thole an assize twice" for the same offence, and that it was different from the present case, in so far as the first trial had resulted in an acquittal, and the whole *species facti* had not been set forth in the complaint in the inferior Court, as was the case here. *Held* that *Cobb's* case, and that of Stevens (J. Sh., 287) ruled this. If fever or danger to life supervened after a trial for simple assault, that would not be a ground for new trial for assault "to the danger of life," which is a mere aggravation, and not a new crime. But there cannot be the crime of murder till the injured person dies, so that no panel can be tried for the same crime when he is tried first during the life and then after the death of the injured person. The supervening death is not a mere aggravation, but creates a new crime. It was not expedient that a trial for assault the day after some scuffle should tie up the hands of the authorities from further action, so that the highest crimes should go unpunished.

The declaration emitted by the panel before his wife's death, with reference to the charge of assault, held inadmissible in the trial for murder.

The panel pleaded guilty of culpable homicide, which plea was accepted by the Advocate-Depute. Sentence fifteen years penal servitude.

Act.—Blackburn.——Alt.—Buntine.

GRANGE *v.* MACKENZIE.—(Glasgow, Sept).

Small Debt Act—Sist—Summons.

A party may obtain a sist of a judgment against him in absence, although the other party has formerly obtained a sist. The summons contained no statement of the grounds of action, but referred to a statement annexed, four pages in length. Observed by Lord Deas, that while a statement of the nature of a condescendence might be considered informal, and while the bringing of such a case (for repetition of a sum paid under threats of nimious diligence, and for damages against a sheriff officer) might be an abuse of the statute, and should have been remitted by the Sheriff to the ordinary roll, yet it could not be said that this informality had prevented the appellant from receiving substantial justice (sec. 31). If the trial was to be in the Small Debt Court at all, it was an advantage to him to have a full statement of the pursuer's case.

H. M. ADVOCATE *v.* LUKE.—(Dundee, Sept. 11).

Proof—15 *and* 16 *Vict. c.* 27—*Seclusion of Jury.*

The panel's agent was examined in exculpation, and asked whether one of the witnesses for the Crown had made a different statement to him on precognition from that which he had made on oath. The witness in question had been asked in cross-examination whether he had made such a statement to the panel's agent. The A. D. objected to the question, *O'Donnell and M'Guire*, 2 Irv. 236. The Court, while thinking that the case might have stood differently if the objection had been taken when the question was put in cross to the Crown witness, held the proposed evidence admissible under 15 and 16 Vict. c. 27 sec. 3, for the purpose of testing the credibility of the witness for the prosecution.

After several witnesses for the Crown had been examined, the trial was adjourned over night, and the jury were committed as usual to the care of the Macer. On the following evening the jury found the panel guilty, and the Advocate Depute moved for sentence. No objection was taken for the panel, and the diet was continued till next morning. On the third day panel's counsel moved that he should be dismissed simpliciter from the bar, and put in a minute in which he stated in arrest of judgment that one of the jurymen had been permitted, on the evening of the 11th, "to leave, or at least escape, from the custody of the Macer and the officer in charge, and was not again seen till near ten o'clock next morning," when the Court assembled, and that during his absence he had communication with various persons to the prisoner unknown. The Court "refused the motion in respect that no exception had been taken to the competency of returning the verdict, or to the motion for sentence, and that the case was continued (without exception on the part of the panel) for the sole purpose of consideration by the Court of the nature and extent of the punishment to follow the verdict of the jury."

Act.—Millar.——Alt.—Guthrie Smith.

H. M. ADVOCATE *v.* KENNEY OR LYNCH.—(Dundee, Sept. 13).

Proof—Procurator Fiscal—Deceased Witness.

The evidence of a procurator-fiscal to prove the statement on precognition of a witness since deceased, held inadmissible. The declaration of such a witness on precognition, and signed by the witness, also held inadmissible, on the authority of *Macdonald* v. *Union Bank*, March 1864, 2 Macph. 964.

H. M. ADVOCATE *v.* FLEMING.—(Dundee, Sept. 13).

Res Judicata—Indictment—Sheriff.

A panel was charged before a Sheriff with culpable homicide, in consequence of his having left his horse on the street without a person in charge of, whereby it ran off and knocked down and killed a person. The Sheriff directed certain words, which set forth that the horse had formerly run off in similar circumstances, to be struck out of the indictment, whereupon the procurator-fiscal moved to desert the diet *pro loco et tempore*. This indictment was then brought, setting forth the same facts, and the panel's knowledge that shortly before the time of the crime charged, the horse had run off in similar circumstances. The plea of *res judicata* in bar of trial (*Longmuir* v. *Baxter*, 3 Irv. 287), was repelled, there being no proposal to try the case again in the Sheriff Court, and the Court of Justiciary not being bound by the decision of an inferior Court. An objection to the statement of the panel's knowledge of the former accident was also repelled.

H. M. ADVOCATE *v.* RICHARDSON AND DAVIDSON.—*Sept.* 13.

Theft—Description of Stolen Property—Amendment of Libel.

The stolen property was described in an indictment for theft, as thirty-three barrels as per inventory, "each containing sugar *and sugar dust*, or sugar sweepings, or a mixture of sugar and *sugar dust or* sugar sweepings. Leave refused to amend the libel by deleting the words in italics, as being an essential change in the description of the stolen property.

ENGLISH CASES.

WINDING-UP.—(*Companies' Act* 1862.)—A holder of fully paid up shares in a limited company is a contributory within the meaning of the Companies' Act 1862, and is entitled to petition for compulsory winding-up of the company.—(*In re The National Savings Bank Assoc.* (*Lim.*), 35 L. J., Ch. 808.) And *In re The Anglesea Colliery Co.* (*Lim.*), 35 L. J., Ch. 809; 2 L. R., Eq. 379, in which also held that liquidators may make a call (§ 133, Nos. 9 and 10) on shares not fully paid up, to reimburse holders of fully paid up shares, the debts of the company having been paid.

PATENT.—(*Specification.*)—A specification, when construed grammatically, claimed to effect a certain end by two processes, one of which would not, in fact, do so. It was in evidence that no skilled practical workman would be misled, as he would know that the one process would be useless, and would take the other; *Held* that the specification was defective, and the patent bad and void in law. It is incompetent 'to correct the specification by the superior intelligence of the reader.'—(*Simpson* v. *Holliday* (H. of L.), 35 L. J., Ch. 811.)

RAILWAY COMPANY.—(*Railway Clauses Act, s.* 87—*Traffic Agreement—Ultra Vires.*)—The Midland Ra. Co. filed a bill against the London and N. W. and ten other railway companies, to obtain the declaration of the Court as to the rights of parties to a fund in Railway Clearing-house, under a traffic arrangement made on 1st Jan. 1856. At that date there were two main lines of communication between London and Edinburgh, one *via* Rugby, Preston, and Carlisle, known as the West Coast route, and the other, *via* Grantham, York, and Berwick, with an alternative line, *via* Rugby, Normanton, and York, together known as the East Coast route. The former belonged to the N. W. Ra. Co. and companies in connexion with it, and the latter to the Great Northern, Midland, North-Eastern, and North British Railway Companies. To prevent ruinous competition, an agreement was made, under the Ra. Clauses Act, which, after defining the routes, and providing that it should include all traffic of whatever description, stipulated that all through traffic from or to any of the places mentioned in the schedule should be carried and sent by the several companies over the said two routes in the proportions given in the schedule, and that the gross revenue should be divided as there specified. The agreement was to remain in force for fourteen years. The 20th section provided that the companies should 'in all respects carry on and conduct such traffic faithfully the one towards the other, and according to the true spirit and intent of this agreement, and should not, by any of the devices therein specified, or by any other means or inducements whatsoever, cause or promote the said traffic to go or be sent, travel, or pass to its place of destination, so that the same, or the revenues derived therefrom, shall not appear and be treated as part of the traffic and revenues to which this agreement relates, or so as to prevent such traffic being carried, or the revenues therefrom divided and apportioned in accordance with the *bona fide* intent and meaning of the terms of these presents, or so as to cause the same to be divided and apportioned differently than would have been the case in case such traffic had been sent and booked or forwarded through directly from its place of despatch to its ultimate place of destination, in conformity with the terms and spirit of this agreement.' The 'alternative' line forming part of the East Coast route was, in fact, the same as the West Coast route as far as Rugby; thence it followed a distinct line by Normanton to Knottingley, where it joined, and thenceforward became one and the same with the East Coast route. The line between Rugby and Knottingley belonged exclusively to the plaintiffs, the Midland Railway Company. A few years after the agreement, the plaintiffs, partly by completing their own new line from Hitchin to Leicester, and partly by leasing and obtaining running powers over other lines of railway, acquired and opened a new through route from London to Edinburgh. This new route, in contradistinction to the East Coast and West

Coast routes above described, became known as the Waverley Route. The profits arising from the traffic on the new route were comprised in the fund now in the hands of the Clearing-house Committee, having been paid in under a separate account, pending the determination of this suit. The questions raised were, whether such profits came within the terms of the agreement, and whether the several companies, parties to the agreement, other than the plaintiffs, were entitled to share in such profits as belonging to the common fund. The entire fund amounted to upwards of L.700,000. Certain other companies, not originally parties to the agreement, had since been admitted into it, and were made defendants in the present suit. KINDERSLEY, V.C. (July 28), said there was nothing in the agreement which could be construed as an express prohibition against the formation or opening of a new route between London and Edinburgh by any of the parties thereto, and that the traffic embraced by the agreement was exclusively that which was in express terms specified therein, and that the language of the 20th section could only be regarded as having reference to such traffic. I have next to consider whether, according to the contention of the defendants, there has not been a breach of an implied covenant against making a new line or carrying goods by any such new line? Now, in order to justify the Court in implying a covenant or condition not in terms expressed in any given instrument, the case must be such as to satisfy the judicial mind that the parties necessarily intended it, and that conclusion must be drawn from something actually found within the instrument. There must be something there expressed upon which you can hang such a conclusion. But so far from inferring that there was any such idea or intention in the minds of those who executed this agreement, the conclusion I come to is, that they either never thought of any such contract at all, or else that they intentionally excluded it from the agreement. For supposing it had been in the contemplation of the parties to enter into such contract, is it conceivable that in this carefully drawn instrument they should have omitted to provide for it by a special clause, and have left it to be guessed at from the terms of the 20th section, or the general language of the agreement? They would, as a matter of course, have had a specific clause directly applicable to it; and in the absence of such a clause, and taking the other circumstances into consideration, I cannot conceive that it was their intention that such a prohibition should be implied. Being of this opinion, it is hardly necessary to advert to the question whether such a contract would be legal; but I think I ought to make a few observations upon that point, and it should be remembered that the rights and powers and obligations of corporate bodies are necessarily regulated by considerations which do not apply to individuals. Many acts are competent to an individual which are not so to a railway company, and *vice versa*; so that in respect of the legality of their acts, these companies must be looked at and dealt with on considerations very different from those which might be applicable to individuals. Now, suppose that these railway companies had all entered into an express agreement that no one of them should ever make or be a party to the making of any other line or route from London to Edinburgh than the routes which then existed. Would such an agreement be lawful? The question, I confess, is arguable; but my own opinion is, that it would be *ultra vires*, and that the companies would not be bound by such a contract. And, in speaking of *ultra vires*, we use the term in reference to the governing body of the company. If every individual member of a company entered into and agreed to be bound by such an agreement, then it might be a question whether that was *ultra vires*; but, in the sense in which we use that term, I think the agreement would be *ultra vires* of the governing body, so as to bind all the members of the company. After referring to *Hare* v. *N. W. Ra. Co.*, 2 J. & H. 80, His Honour continued,—Now, admitting, as I do, the difficulty of determining this point with reference to the authorities, I yet cannot help thinking that it would be *ultra vires*. I think that the governing body of a company has no right, as against the whole body of members, to bind that company down to a particular, stipulated, and limited line of operation, and to exclude the possibility of its being a party to the making of a more enlarged or more beneficial

line of railway. It must be borne in mind that such a stipulation would be little short of a stipulation prohibiting the companies from ever applying to Parliament for the purpose of constructing a new or improved line of traffic. Upon the grounds already stated, however, I am of opinion that there is here no such stipulation, and therefore that the plaintiffs are solely entitled to the proceeds arising from the traffic on the Waverley line. There must be a declaration that so much of the fund in the hands of the Clearing-house Committee as has arisen from the traffic on the Waverley route is not within the terms of the agreement of the 1st of January 1856. The costs of all parties to come out of the fund.—(*Midland Ry. Co.* v. *London and N. W. Ry. Co.*, 35 L. J., Ch. 831; 2 L. R., Eq. 524.)

PLEDGE.—(*Bailment—Debentures.*)—The question was, whether, where debentures have been deposited as security for the payment of a bill of exchange, with a right on the part of the depositee to sell or otherwise dispose of the debentures in the event of non-payment of the bill,—in other words, as a pledge,—and the pawnee pledges the securities to a third party on an advance of money, the original pawnor, the bill of exchange remaining unpaid, can treat the contract between himself and the first pawnee as at an end, and, without either paying or tendering the amount of the bill of exchange, for the payment of which the security has been pledged, bring an action of detinue to recover the thing pledged from the holder, to whom it has been transferred; *Held* unnecessary to determine whether a party with whom an article has been pledged as a security for the payment of money has a right to transfer his interest in the thing pledged (subject to the right of redemption in the pawnor) to a third party. But observed, that such a right in the pawnee seems inconsistent with the undoubted right of the pledgor to have the thing pledged returned to him immediately on the tender of the amount for which the pledge was given. *Held* that the transfer of the pledge does not put an end to the contract, but amounts only to a breach of contract, upon which the owner may bring an action for nominal damages, if he has sustained no substantial damages,—for substantial damages if the thing pledged is damaged in the hands of the third party, or the owner is prejudiced by delay in not having the thing delivered to him on tendering the amount for which it was pledged. It was not a case of lien, which is merely the right to retain possession of the chattel, and is immediately lost on the possession being parted with, unless to an agent of the party having the lien for the purpose of its custody. In the contract of pledge the pawnor invests the pawnee with much more than the mere right of possession. He invests him with a right to deal with the thing pledged as his own if the debt be not paid and the thing redeemed at the appointed time. *Held*, in accordance with *Johnson* v. *Stear*, 15 C. B., 330, that a pawnor cannot recover back goods (and the same principle would obviously apply to debentures) pledged as security for the payment of a debt or bill of exchange until he has paid or tendered the amount of the debt.—(*Donald* v. *Suckling*, 35 L. J., Q. B., 232; 1 L. R., Q. B. 585.

NUISANCE.—(*Master and Servant.*)—The workmen of a colliery owner stacked the refuse of the colliery, so that it fell into a navigable river and caused an obstruction therein. The master being indicted for a nuisance, was held liable, notwithstanding that he did not personally superintend the works, and that he had given express orders to the workmen to deposit the refuse in a particular place, where it would have done no harm, and not to put it in the river.—(*The Queen* v. *Stephens*, 35 L. J., Q. B., 251; 1 L. R., Q. B. 702.)

NULLITY OF MARRIAGE.—(*Impotency.*)—After a cohabitation of fourteen years, a woman presented a petition in the Divorce Court for a decree of nullity of marriage, on the ground of the man's impotence. The report of the inspectors and the medical evidence shewed that she was *virgo intacta et apta viro*, and that there was no apparent defect or malformation in the man. The Court was satisfied that the marriage had never been completely consummated, but was not satisfied that the non-consummation arose from the incapacity of the man, and, therefore, dismissed the petition:—*Held*, by the House of Lords, reversing the decree of the

Court below, that the woman was entitled to a decree that the marriage was null and void, on the ground that the cohabitation had been for a much more lengthened period than was required to raise the presumption against a husband, and that the onus was thrown upon the respondent, either of disproving the facts, or of shewing, by clear and satisfactory evidence, that the result was attributable to other causes than his own impotency.—*Lewis* v. *Hayward* (H. of L.), 35 L. J., Prob. & Div. 105.)

INTERNATIONAL LAW.—(*Testator domiciled abroad.*)—A domiciled Scotchwoman executed in Scotland, in the English form, a codicil, purporting to be made in the exercise of powers conferred by English settlements and an English will: *Held*, with hesitation, that the codicil, purporting to be under a power, was entitled to probate, though invalid by the law of the domicil of the testatrix.—(*In the goods of Hallyburton*, 35 L. J., P. & D. 122.)

FOREIGN JUDGMENT.—A suit was brought in the Court of Probate as to the succession to the personal estate of the deceased, who died domiciled abroad: *Held*, that a judgment of the Court of the domicil is binding and conclusive as to any question raised in the Court of the domicil between the same parties, and in relation to the same succession. The Court of Probate has no jurisdiction to determine whether such a judgment is according to the law of the country where it was pronounced.—(*Doglioni* v. *Crispin* (H. of L.), 35 L. J., P. & D. 129.)

SHIPPING.—The owners of a vessel are bound to pay the costs of defending the master against a false criminal charge made abroad by some of the crew, in consequence of having been previously corrected by him in the course of his duty.—(*The James Seddon*, 35 L. J., Adm. 117.)

PRIZE (*Capture—Co-operation*)—All prize belongs to the Crown, which, for at least 150 years, has been in the habit of granting it to the "takers." The "takers" are either actual or constructive. "Actual capture" is the rule always followed in the adjudication of prize, except in cases in which the application of constructive capture is well-recognized and established. The prize Court will not enlarge the doctrine of constructive capture. "Joint captors" are those who, not being themselves the actual captors, have assisted, or are taken to have assisted, the actual captors by conveying either encouragement to them, or intimidation to the enemy. Meritorious service is not in itself sufficient to constitute a person a joint captor. Claims of joint capture rest either upon association or co-operation. "Joint captors, by reason of association," claim in virtue of some bond of union existing between themselves and the actual captors. Claims by reason of co-operation are founded on aid rendered on the particular occasion to the actual captors. When association exists, a capture by one enures to the benefit of all. The others need not be co-operating further than that each, at the time of the capture, should be discharging the part assigned to him of the service for which all are associated —union under the immediate command of the same officer, and that union alone, constitutes the title to joint sharing. If the bond of union has ceased to exist at the time of capture, community of enterprise is insufficient for a title to share by reason of association. The limits of co-operation are those within which encouragement to the friend and intimidation to the enemy in fact operate.—*The Banda and Kirwee Booty*, 35 L. J. Ch., 17.

CHARTER-PARTY (*Guarantee.*)—Defendants chartered plaintiffs' vessel, to go to A., and there load a full cargo of oil for London, at a freight which would have amounted in all to £1200. Not being able to load such cargo, a new contract was made, cancelling the charter-party, and plantiffs were to put the vessel on the most profitable charter or trade procurable, and defendants guaranteed "£900 gross freight home." Plaintiffs could only procure a cargo the gross freight of which to London was less than £900, and the vessel accordingly left A. with such cargo:—*Held*, that the breach under the guarantee accrued when the vessel so left A. with a cargo not sufficient to earn £900 freight, and defendants were, therefore, liable for the amount of the deficiency, notwithstanding the ship and cargo were totally lost on the voyage.—*Carr* v. *the Wallachian Petroleum Co.* (*Lim.*), 35 L. J. C P., 314.

THE

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ON SHERIFF COURT PLEADING.

The Sheriff Court Act of 1853 is one of those vigorous plants which flourish in any soil, and endure almost any kind of treatment. In some counties it has received more justice than in others, but on the whole it cannot be said that no improvement is needed in the manner in which the statute is administered. We do not say so in any hyper-critical spirit. Although the benefits which it has conferred on the country admit of no dispute—particularly in simplifying, shortening, and cheapening the procedure—there is every reason to believe that, with greater attention to the principles of pleading, and with a more rigid observance of the directions of the Act, the Inferior Courts would be brought into still closer harmony with the spirit of the times, and become more thoroughly suited for the transaction, at least in the first instance, of the mass of the legal business of the country, We do not mean to insinuate that the Sheriffs or the practitioners before them are much to blame for the great variety, and, in many cases, the exceeding looseness of the practice which now prevails. When, thirteen years ago, Parliament decreed the very radical changes which are embodied in this Act, it committed the duty of carrying them into effect to a generation who had been trained in an altogether different school, and whose habits were so inveterately formed that they had naturally some difficulty in at once adapting themselves to the tone, and catching the spirit of the new legislation. The difficulty of doing so will be seen at once by those who like ourselves have been amused with the fruitless efforts of

certain elderly Sheriffs to accomplish what every Clerk of the Peace in England can do—namely, state an intelligible case for the opinion of the Supreme Court. Their apology is, that they have never been used to this sort of thing; but if their difficulties under modern legislation are great, how much greater must have been those of the country solicitors, when they were suddenly told in 1853 that they must at once unlearn almost all that they had ever learned regarding the conduct of a suit, since their tiny limbs were first perched on the giddy elevation of a three-legged stool. The system in use before 1853 was a system not calculated to bring out a distinct and intelligible issue upon the record, but to prevent its being ever attained. In plain Scotch it was a system of "*jinking*." Parties were not brought face to face on the real matter of controversy, but came to the contest habited like ancient knights, armed not for the purpose of crossing swords, and so settling their difficulties at once, but of feinting and parrying till the conflict was indefinitely prolonged, and one or other sank exhausted on the field. It was a recognized rule never to show your hand at the beginning; but to keep your best points for the final onslaught, when you had seen the sort of case which your adversary intended to make by way of defence. The written pleadings were a mixture of fact and legal argument, loaded with citations from authorities, and not unfrequently relieved by fine flights of imagination, or abuse of the opponent. Proofs were taken by commission, which often the Sheriff-Substitute never read. When we think of such a system we are profoundly grateful for the Act of 1853, but at the same time the remembrance of it explains the existence of many deficiencies in the existing practice which we hope by and by to see wholly removed. We shall be glad to receive for publication suggestions from correspondents as to the best means by which this can be done; and in the meantime we desire to direct attention to one or two points in which (after a perusal of the proceedings in a number of advocations from different parts of the country) we are satisfied that too much laxity at present prevails.

I. *The Summons.*

It is very much to be regretted that, as in the Summary Procedure Act, a great variety of forms were not appended to the statute for the guidance of the practitioner. However, the form

given in Schedule A clearly shows the sort of instrument which the Summons was in future intended to be. It provides for four different cases:—(1) Where the action is founded on a liquid document. (2) Where it seeks to obtain specific performance of a contract, such as delivery of goods sold but not delivered. (3) Where the demand is payment of a sum of money, such as the price of goods sold or a balance arising on an account; and (4) where the claim is damages.

In almost every Sheriff Court summons which it has been our lot to examine, it is impossible not to see lurking, in an apparent compliance with the short statutory forms, the old anxiety to make a statement of the cause of action as full and particular as possible, so as to avoid the smallest chance of being cast on the relevancy. However simple the case, it must be arrayed with the most grotesque redundancy, on the principle, we presume, that if it does no good it can at least do no harm—*superflua non nocent.* Not only is the cause of action minutely set forth, but it is accompanied not unfrequently with a copious detail of surrounding circumstances, which, being matters of evidence, ought never to enter the record at all. This seems to be the Scotch pleader's Old Man of the Sea, of which, with no amount of kicking and shaking, will he ever get rid; and it is this very peculiarity running through all our styles which prevents our pleadings from being reduced to that point and symmetry they might easily attain. Parties can never come to an issue under a cloud of words; and besides being thus positively mischievous, it is wholly contrary to the intentions of Parliament. The Sheriff Court Act declares in section 51, "that all laws, statutes, Acts of Sederunt, and usages now in force, shall be and same are hereby repealed, but in so far only as may be necessary to give effect to the provisions of this Act, and no further or otherwise." Now, what was the rule formerly in force with respect to the structure of a summons which is here abolished? It is contained in chap. ii. of the A. S. 10 July 1839—"The summons must contain a concise and *accurate* statement of the facts, and must also set forth in explicit terms the nature and extent and grounds of the complaint or cause of action, and the conclusions deduced therefrom." There is a charming simplicity in the word we have italicized, which, considering the persons to whom it was addressed, gives a rather comical air to this regulation, but it serves to distinguish the portion of it abolished from that which is in

force. The *thing* really essential—the ground of action—still remains, but a sample of the "explicit terms" in which it must be set forth, is given in Schedule A of the Act of 1853,—that is to say, it must be set forth in a single proposition, and without any detail of the facts, or of those matters of evidence by which, when the proper time comes, it is to be supported. Nay, not even the date is to be given in two out of the four cases with which the formula deals. The defender simply gets notice that he is "to make delivery of sold by the defender to the pursuer," or that he is required to "pay £ , being damages sustained by the pursuer in consequence of the defender having slandered the pursuer, by stating," &c. The omission of the date is an obvious overlook, which the common sense of the profession has not hesitated in all cases to supply; but this just exhibits forcibly the anxiety of Parliament that all such details as are commonly met with in a condescendence or equity pleading should be strictly excluded.

Our advice then, to the practitioner, is a liberal use of the *limæ labor*. Consider under what category of legal rights your case falls,—is it a bill, a loan, a guarantee, a sale, an agreement, or a delict,—and you will generally find it may be expressed in a single proposition of one or two lines. If it is defamation, don't charge the words as having been uttered groundlessly, recklessly, falsely, calumniously, maliciously, and without probable cause; for, if it is unprivileged, falsely and calumniously is sufficient; if it is privileged, maliciously only requires to be added.

In short, it may be laid down with perfect confidence that the nature, extent, and ground of an action in the Sheriff Court is well and relevantly stated in every proposition which, if true and unexplained, leads to the necessary inference, and entitles the Judge to hold, that the defender is in law liable to pay the sum sued for, or to make delivery of the goods sought to be recovered.

We are well aware that the best way of enforcing these views would be to give here a series of forms showing how they will work in actual practice. But that must be done on a much more comprehensive plan than is possible within our present limits; and we shall, with our reader's permission, simply submit a few rules which may be of use in the great majority of cases.

(1.) The first rule is the one on which we have already so strongly insisted. In alleging a fact it is not necessary to aver such circumstances as merely tend to prove the truth of the fact.

It is sufficient if the defender is apprised of the specific nature of the question to be tried. For instance, in a case of assault, it is enough for the pursuer to say that, on a certain day, in a certain place, he was assaulted by the defender. To add that he pulled his nose, tore his coat, and threw him to the ground, is all surplusage in the record, and should be left to appear at the trial. As Mr Stephens puts it—"Those subordinate facts which go to make up the evidence by which the affirmative or negative of the issue is to be established do not require to be alleged, and may be brought forward for the first time at the trial when the issue comes to be decided. . . . . This is a rule of great importance from the influence it has had on the general character of English pleading; and it is this, perhaps, more than any other principle of the science, which tends to prevent the minuteness and prolixity of detail in which the allegations under other systems of judicature are invoked."

(2.) The pursuer should set forth his title, which should either be in himself or in another whose right he is entitled to enforce, or in the defender when he is sued in a particular character. But provided the character in which the party sues or is sued is set forth on the face of the summons, it is in general unnecessary to aver the particular deed by which it is to be supported, for that is not matter of averment but of evidence. We are aware that the common practice is otherwise. It is usual to say, "Whereas it is shown to me by B. and C., trustees and executors of the late D., *nominated and appointed by him under a Trust Disposition and Settlement executed by him on, &c., and recorded,*" *&c.;* but it humbly appears to us that the words in italics are pure surplusage. The title to sue is the fact that they are trustees and executors; the evidence of that fact is the deed on which they found and which must be produced before they can advance a single step. So also in asking a decerniture against a person in a particular character, as trustee, executor, &c., the conclusion ought not to run as if he were sued as an individual, for otherwise he might be liable to imprisonment even after the trust funds were exhausted.

(3.) In pleading it is not necessary to aver matter of which the Court takes notice *ex officio*,—such as statutes, and the rules of the common law. The presumption of law is, that every judge knows by heart every Act of Parliament that was ever ·····ed; and consequently only private statutes, which are not to be

judicially noticed, require to be specially pleaded. For instance, when a collector sues for poor-rate, he needs not aver that the assessment was imposed by the Act 8 and 9 Vict., c. 83, seeing that no rate or assessment could be imposed in any other way.

(4.) It is not necessary to state matters implied. For instance, where delivery of goods is sought under a contract of sale, it is enough to aver the nature and quantity of the goods, the sale, the date of it, and the price, without further saying that the pursuer is ready to pay the price. If the defence is, that the pursuer refused to pay the price, it is for the defender to aver and prove it; and in general it will tend to prevent confusion if the pleader abstain from stating matters which more properly come from the other side. Here, however, we should point out that when the action is founded on a delict, *e.g.*, a wrongful breach of duty, the summons should aver not only the pre-existing duty, but the manner in which it was broken. In such cases the defender is entitled to plead either that no such duty as that alleged was incumbent on him, or that the duty was duly observed. The conclusion might be expressed thus—"Therefore, the defender ought to be decerned to pay the sum of £100, being the damages sustained by the pursuer in consequence of the defender having wrongfully, contrary to his duty as the pursuer's employer, failed to have the machine at which he was set to work properly fenced, whereby he lost his arm, and was otherwise injured."

We are far from saying that these rules are exhaustive. They are mere suggestions, intended to assist those who are really desirous to make the pleadings in the Sheriff Court more exact and scientific than hitherto. Till a proper treatise on pleading is supplied to the profession, we think the Issues in use in the Court of Session for Jury Trials, and which are scattered up and down the reports, will in general be found the safest exemplars to follow in framing a Sheriff Court Summons. Mr Soutar's Styles is also a very useful hand-book, although, no doubt, some of his forms will be improved in his next edition.

II. *The Minute of Defence.*

We believe that much misconception exists as to the form in which the Minute of Defence should be expressed. We have seen a Minute of Defence nearly as long as the proof which was ultimately led in the case, with pleas in law added, for which,

as we read the Act of Parliament, there is no warrant whatever. The Act declares (sec. 3), that on the first Court-day after appearance has been entered, or, at latest, next Court-day, "the Sheriff shall hear the parties in explanation of the grounds of action, and the nature of the defence to be stated thereto, and if satisfied that no further written pleadings are necessary, he shall cause a minute in the form of Schedule D to be written on the summons, setting forth concisely the *ground of defence*." It will be seen that the defender is not required to set forth on record the facts which he intends to prove at the trial; he has merely to indicate the nature of the issue which he means to raise with the pursuer; and he is to do so in such curt terms as these:—

"The defender's procurator stated that the defence was—

"1. No title to sue.

"2. Prescription.

"3. The goods specified in the account libelled were not ordered.

"4. The goods specified in the account libelled were not received.

"5. Compensation conform to account due by pursuer amounting to £ , herewith produced.

"6. The defender who was drawer of the bill sued on received no notice of dishonour, &c."

"Or otherwise, *in like manner*, as the case may be,"—that is to say, the same brevity must be observed in all cases, without any detail of the circumstances by which the defence is to be established. It will be seen that nothing whatever is said about a note of pleas in law. The statute only authorises them to be appended to the statement of facts when the record is ordered to be made up by condescendence and defences.

It is some justification of the unwarrantable liberties which in almost every county have been taken with this portion of the statute, that the practitioners have been actuated by an honest desire to record their defence in such a way that there may be no possibility of surprise at the trial. But the Act provides against surprise *elsewhere* than in the minute. When the parties appear before the Sheriff, the first thing for the pursuer to do is to make an oral statement of the grounds of action—which, at least, ought to be as full as the opening statement of the junior counsel at a Jury Trial. On this occasion his adversary is entitled to have full notice of everything that is to be proved; while, on the other hand,

the pursuer is entitled to have from the defender a sufficiently instructive statement in explanation of the nature of the defence which is to be maintained. It is only after hearing both parties in that way that the Sheriff is to cause a note of the defender's points to be engrossed on the record; but plainly there is no necessity for the minute being a verbatim report of the procurator's speech on the occasion. We are astonished to learn that in practice these formalities are hardly ever complied with. Generally the pursuer's procurator makes no statement at all; while the defender's agent contents himself with some luminous discourse of this description :—"My Lord, in this case I have framed a minute of defence, and your lordship will close the record." The minute when examined generally begins in this fashion:—"The defender's procurator stated that the defence was a denial of the libel,"—then follow three or four pages of averment, giving the defender's version of the transaction, concluding with the inevitable and preposterous pleas in law. The consequence is that it is perfectly hopeless to extract anything in the nature of an intelligible issue out of the record. The pursuer comes to the proof with an array of witnesses which at the last moment is found to be quite unnecessary, as the only matter to be put in controversy is some subordinate point which could have been explained in a sentence in the minute of defence when the case was first called—at least as easily as to have made it the long rigmarole which unfortunately it is.

The evil is now so extensive and so deeply-seated that we do not know if it will ever be effectually cured without an Act of Sederunt. The Supreme Court has frequently shown a most laudable disposition to insist that in the Inferior Courts the provisions of this most excellent measure shall be rigidly observed. It did so lately when it refused to look at a proof which of consent had been taken by commission instead of by the Sheriff Substitute himself as the Act requires. These visitations may fall heavily on the particular parties, but they are dictated by a proper feeling, namely, that it is the duty of the Supreme Court to protect the community against the laziness and incompetence of every body in the Inferior Court,—no matter who, be he judge or practitioner, who sets the statutory regulations at defiance. We respectfully solicit their lordships' attention to the prevailing form of the minute of defence. We venture to say that in nineteen cases out of twenty it will be found to be expressed in such

a form that there is no statutory warrant for its being appended to the summons at all, and the Sheriff might as well have closed the record on a chapter of Tom Jones.

We suspect that the present system is in a great measure the result of the imperfect manner in which agents are informed of the nature of their case at the first calling. They have had little opportunity for making inquiry—no precognition has been led,—therefore they "stick to generals,"—and leave the case as the litigation proceeds to develope its own points itself. This is not fair either to the Court or the parties, and the only apology is that the fees in the Sheriff Court are so wretchedly small that there is no great encouragement to take much trouble with a case. It is obvious that a proper system of pleading can never be established on such conditions; and we think it our duty to speak thus plainly, because we believe that if the Sheriff Court Act was properly administered no better form of pleading was ever invented —elastic and yet exact, free from all English technicalities, and yet capable of raising in the purest and simplest form the precise thing *de quo agitur*. Properly understood there is no mystery in the art of pleading, but the first essential is that a party should know his case thoroughly. It is but the application of that analytic process by which the mind, even in ordinary affairs, develops and clears from all extraneous matter the one question about which any dispute or difficulty can exist. Indeed, we do not know if our readers will anywhere find more excellent counsel as to the manner in which a minute of defence should be framed than in the writings of a jurist who lived long before both Acts of Parliament and Acts of Sederunt—one of the sages of ancient Rome. Quinctilian, in the part of his work relating to the *Dispositio*, explains with great minuteness the method which he himself employed to ascertain the nature of the issue to be tried. He begins by saying that in the first place he took care to inform himself of all the different matters involved in the cause. Next he considered the sort of case which it was the object of either party to make. "With this view," he says,* "I began by con-

* Quinct. lib. vii. c. 1.—Cogitabam quid primum petitor diceret. Id aut confessum erat, aut controversum. Si confessum, non poterat ibi esse quæstio. Transibam ergo ad responsum partis alterius; idem intuebar: nonnunquam etiam quod inde obtine batur, confessum erat. Ubi primum cœperat non convenire, quæstio oriebatur. Id tale est, *Occidisti hominem, Occidi:* convenit: transeo. Rationem reddere debet reus quare occiderit. *Adulterum*, inquit, *cum adultera occidere licet;* legem esse certum est. Tertium jam aliquid videndum est, in quo pugna consistat.

sidering what might be alleged by the pursuer. This statement would necessarily either be admitted or denied by the defender. If admitted, no question could there arise. I passed, therefore, to the defender's answer, and considered in the same way whether it was admitted or denied by the pursuer. Sometimes the matter averred in it was admitted. At all events the question (or issue) arose as soon as there began to be a disagreement between the parties. For example,—*You killed a man. I did kill him.* The fact is admitted, and I proceed. The defendant ought now to give some reason *why he killed him? It is lawful*, he says, *to kill an adulterer taken with the adulteress.* It is admitted that such is the law. We must therefore look for some other matter in which the dispute lies. *They were not adulterers: They were.* Here is the question. It is an issue of fact. Sometimes, however, the third point also is admitted, *that they were adulterers.* But the accuser may say, *It was not lawful for you to kill them, because you were an exile or infamous.* The question then is one of law. But if when the pursuer says at first *you killed*, and the defender says, *I did not kill*, the question arises, and the issue is ascertained at the outset. In this way we must examine where the disagreement begins, and where a question first arises."

This lucid analysis shews that in all ages the human mind has in this matter pursued identically the same process; and surely there is no reason why it should not be followed in the Sheriff Court as well as elsewhere. If the subject is considered for a moment, it will be seen how easily the system could be followed under our existing forms.

(1.) In examining a Summons, the first duty of a defender is to see whether the pursuer's case is, on his own shewing, open to any objection in point of law. If it is, then he will say the pursuer's case is not relevant, or "the pursuer is not entitled to recover."

(2.) If he disputes any matter of fact, on which the action is founded, he should repeat the statement objected to in the very words of the Summons, with the addition of "not." This is

Non fuerunt adulteri: fuerunt: quæstio, de facto ambigitur, conjectura est. Interim vero & tertium confessum est, adulteros fuisse: sed *tibi*, inquit accusator, *illos non licuit occidere: exul enim eras, & ignominiosus:* de jure quæritur. At si protinus dicenti, *Occidisti:* respondeatur, *Non occidi*: statim pugna est. Sic explorandum est ubi controversia incipiat, & considerari debet quæ primam quæstionem facit.

much better than saying, "the defence is a denial of the libel;" and there is no reason why the English rule should not be observed—"That every pleading is taken to confess such traversable matter alleged on the other side, as it does not traverse." For instance, if the action is one of damages for assault, there is no occasion to give a detail of the circumstances of the altercation but let him select any of the grounds on which the action is excluded, thus:—

(1.) The defender did not assault the pursuer as alleged.

(2.) The assault was justified, being in self-defence.

(3.) An apology was accepted, and a sum received in full of the claim.

(4.) The defender was provoked by the offensive language of the pursuer, and the sum of L.1 is tendered.

In the same manner in an action for goods sold and delivered, the minute of defence may contain one or other of the following grounds:—

(1.) That the goods were never ordered.

(2.) That the goods were not timeously tendered within the period specified.

(4.) That they were disconform to warranty.

(5.) That the price was paid or tendered before action brought.

(6.) That the sale was subject to conditions which have not been purified: namely, &c.

These examples will tend to show how easily a more exact and methodical system of procedure might be substituted for the loose practice now prevailing. We commend the subject to the attention of our readers, and if the views which we have expressed do not wholly command assent—which, from their novelty, they can hardly be expected to do—we are sure they will at least be regarded as an honest endeavour still further to increase the popularity, and to extend the usefulness of this important and much valued branch of Scottish judicature.

THE FORESHORE QUESTION.

THE association for the defence of the right of subject-proprietors to the Foreshore has gained an important victory in the decision

of the recent case of *Her Majesty's Advocate* v. *Maclean*, 23d May 1866, 38 Sc. Jurist 584, for although the judgment was given in the Outer House (the Reclaiming Note being refused of consent), and the circumstances of the case were peculiarly favourable to the proprietor, Lord Jerviswoode's Interlocutor and Note cannot fail to have an influence in any future case which may be brought before the Court. The discussion, too, which the subject has undergone, has, we believe, strengthened the opinion previously existing in the profession, with the exception of a few Crown lawyers, that the pretensions of the Crown, which have been held for some years past in terrorem over all proprietors on the coast, are unfounded, so that it is exceedingly probable that no further attempt will be made to establish them. It is only fair that this opinion and the grounds of it should be made generally known, as much injustice* has been done by sales of foreshore to the adjacent proprietors on the part of the Commissioners of the Woods and Forests,† owing to the uncertainty in which the question was supposed to be involved.

Whatever doubt may have been imported into the subject from English authorities‡ and certain modern *obiter dicta* in the

* See Parliamentary Paper, 24th July 1866 (Foreshore, Scotland). The correspondence published by the Duke of Argyle will be in the recollection of many of our readers, in which, unfortunately, there was too much personal feeling to allow of a dispassionate consideration of the merits of the case.

† The Act of last Session, 29 and 30 Vic. c. 62 (Crown Lands Act), which transfers the management of the Foreshore from the Commissioners of Woods and Forests to the Board of Trade, expressly declares (sec. 7) that such management shall be subject "to such public and *other* rights" as by law exist in the Foreshore, and has besides a general saving (sec. 31) of all private rights. It makes no alteration, therefore, in the existing law with reference to the property of the Foreshore. This Act has been omitted from Messrs Blackwood's Collection of Statutes affecting Scotland, and is marked as an English Act, but it plainly applies to the United Kingdom. See section 7. An article in the *Courant*, which stated very accurately the law on this subject, ingeniously suggests that this transfer from a department which protects the patrimonial interests of the Crown, to one whose functions are purely or chiefly administrative, indicates an abandonment of the Crown's claim to property in the shore.

‡ An examination of these, into which it is impossible here to enter, has convinced us that while the law of England is more reluctant to imply a grant of the shore, it does not deny that such grant may be given either expressly or by implication. Consult Selden, *Mare Clausum*, Lib. 2, cap. 2. Hale, *De Jure Maris* (in Hargrave's Law Tracts). Callis, *on Sewers*, p. 39-41. Hall, *on the Seashore*. Woolrych, *Law of Waters*, Appendix, p. 433; and the following cases:—*Constable*, 5 Coke, 107; *Lord Gwydir*, 4 Maddon, 281; *Bulstrode*, Siderfine's Rep., 168; *The King* v. *Lord Yarborough*, 3 B. and C. 91, and 5 Bingham 163 (H. of L.); *In the Hull and Selby Railway Co.*, 5 M. and W. 329); and *Attorney General* v. *Chambers*, 4 De Gex. 213; (Baron Alderson's opinion).

Court of Session and House of Lords, the law of Scotland, as embodied in the decisions and expounded by its institutional writers, has never varied. We have nothing to do here with questions of public policy; so long as land-rights remain on the present footing, the duty of courts of law is to maintain them in their integrity, and the sole question for lawyers is what is their extent. With a view to determine the extent of the right of subject-proprietors in the foreshore, we propose to make a detailed but necessarily concise examination of the decisions, referring, where necessary, to the opinions of the text-writers.

The proprietor of lands adjacent to the seashore may hold them either by a bounding title, or by one not bounding but descriptive. In the case of a bounding title the settled rule of law is that everything is included which lies within the specified boundaries, and that nothing is or can be by any possession, however long or ample, included which lies without them. The granter, whether Crown or subject, gives to the grantee only that portion of his land which is contained by the boundaries specified; he retains whatever is beyond them. Both branches of this rule have been frequently given effect to in the case of lands lying on or near the seashore. In the following cases the titles were held to exclude it:—In *Gordon* v. *Suttie*, 26th May 1837, 15 S. 1037, the northern boundary of the feu being "the Sea Craig," a known piece of ground to the landward of the sea, the feuar, who admittedly had had possession of the ground down to the sea, although not for the prescriptive period, was held excluded from it by the terms of his title. The findings of the Lord Ordinary (Corehouse) are worth quoting for the precision with which they state the grounds of judgment. "Finds, that the authors of the defender obtained right to the feus in question by grants, in which the boundaries are specified, and the measurement of each feu in the length and breadth minutely stated: Finds that the piece of ground in dispute is not included within the specified boundaries of either feu, but that the Sea Craig, the name given to the northern boundary of the feus, appears to have been applied to the ground in dispute, because it has a perpendicular face of rock towards the sea, while it admits of being pastured upon the side next the land: Finds, that in these circumstances, the defender could not acquire the ground in dispute by possession in the face of the bounding title, and that it was not gained by occupancy as part of the shore." It will be observed that there

was in this case a separate ground of judgment, arising from the fact that the measurement of the feus in the titles excluded the piece of ground claimed.* In *Kerr* v. *Dickson*, 28th November 1840, 3 D. 154, aff., 18th July 1842, 1 Bell's App. 499, the boundary was "the sea-wall which divides the said subjects from the sea-beach on the south," and it was held that the sea-beach was excluded by the title, and could not be acquired even by prescriptive possession. In *Berry* v. *Holden*, 10th December 1840, 3 D. 205, "*the flood-mark*" was found to be a specific boundary excluding the shore; and this was followed in *The Magistrates of St Monance* v. *Mackie*, 5th March 1845, 7 D. 852, where the boundary was in one title "the common passage and *full sea*," and in another, "*the full sea*, the High Street intervening."

On the other hand, "*the sea*" in the first Culross case (*Magistrates of Culross* v. *Earl of Dundonald*, 15th June 1769, M. 12,810, see also *Leven* v. *Magistrates of Burntisland*, 27th May 1812, Hume, p. 555) was held to include the sea-shore, at all events to the extent of entitling feuars with such a boundary to gather sea-ware to the exclusion of the granters of their rights; and in the second Culross case (*Magistrates of Culross* v. *Geddes*, 24th November 1809, Hume, p. 554) a boundary "*by the sea-shore*" itself was found to give a right to enclose the ground between high and low water, notwithstanding an offer on the part of the magistrates the granters of the feu to prove immemorial possession. The last decision was followed in *Bouchier and others* v. *Crawford*,† 30th Nov. 1804, 18 F. C. 64, where both "*the sea*" and "*the seashore*" occurred as boundaries, and applied in *Cameron* v. *Ainslie*, 21st January 1848, 10 D. 446, "*sea-beach*" being held equivalent to seashore.

It may be doubted whether antecedent to these last decisions a sound distinction might not have been drawn between "the sea" and "the seashore" as boundaries,‡ since it hardly seems consistent with principle that a boundary like the seashore, which is not a mere division line, as a wall or hedge, should be held to

* *Cf. Greenock Harbour Trustees* v. *Stewart*, 12th Jan. 1866, 38 Scot. Jurist 148.; 4 Macph. 283.

† See also *Campbell* v. *Brown*, 18th Nov. 1813, 17 F. C. 444, especially Lord Meadowbank and Lord Glenlee's opinions.

‡ There is even a tradition that the case of *Bouchier* was to have been reversed in the House of Lords on this ground, but that judgment was not given, owing to the death of one of the parties.

include itself, but three consecutive judgments must be deemed to fix the law against such a distinction; nor is there any reason to be dissatisfied with this result, except as admirers of the "elegantia juris." It would practically be inexpedient and inequitable that boundaries which, as the cases above quoted show, have been used indifferently by conveyancers with reference to contiguous subjects on the shore, and even in different deeds with reference to the same subject should be interpreted, the one as including, the other as excluding, the foreshore. In all these cases of bounding titles the shore is not to be considered as a pertinent in the sense of a thing external to the principal subject; it is a part of the principal subject as distinctly as any other portion of the land conveyed. No doubt the sea differs from most other boundaries in not being stationary, and hence grants so bounded are liable to enlargement if it recedes, or diminution if it advances; but this peculiarity has been held, as the cases cited prove, no reason for applying to it a special rule of construction; it is only just that the same person who loses in the one case should gain in the other, "ubi onus ibi emolumentum."

An attempt has been made to elide the authority of the cases in which the grants were held to include the seashore, by the observation that the Crown was not a party to them, the question having always arisen with subject-superiors. It seems plain, however, that the fact of the grant proceeding from the Crown can make no difference where its extent is clearly fixed by boundaries within which the seashore lies. The contention that where the grant is ambiguous either in respect of the specified boundary, as in the case of the seashore itself being the boundary, or, as in descriptive titles, it should be construed strictly in favour of the Crown, although it has some foundation in English law, does not appear to us to have any in that of Scotland. Mr Bell's doubt upon this point is supported only by reference to a single decision of the English Admiralty Court*—(*The Elsebe*, 5 Rob. Ad. Rep. 182), in which the eminent judge (Lord Stowell) speaks of the "wise policy of *our own peculiar law*, which interprets the grants of the Crown by other rules than those which are applied to the construction of grants of individuals." This exception to the maxim, "Verba chartarum fortius accipiuntur contra proferentem," whether founded on wise or astute policy, is an offshoot

* Principles, sec. 643.

of the high prerogative doctrine* of the English law, which, to the honour of our lawyers, never prevailed to the same absurd and unjust extent which it did, and in some points still does, in England, and we are not aware of any authority in Scotch decisions to the effect that Crown grants are to be construed differently from those of subjects.

We now pass from the class of bounding to that of descriptive titles, in which the lands adjacent to the seashore, whether erected into a barony or not, are held with a clause of parts and pertinents, and are *de facto* bounded by the sea.

The recent decision in the Ardgour case (*Lord Advocate* v. *Maclean, ut supra*) places beyond controversy the proposition that a barony title, combined with prescriptive possession, gives its holder a right to the foreshore in a question with the Crown, and it also disposes of the fallacy that possession of the shore for every purpose for which it is adapted, can be ascribed to a collection of servitudes; but a review of the decisions, both in earlier and more recent times, will support propositions much wider than these. Of the older cases it is sufficient to refer to three or four. In them the question of property generally arose indirectly, the immediate object of dispute being wreck and ware, sand, gravel, or other product of the shore.

In the case of the *Earl of Morton* v. *Covingtree*, 20th June 1760, M. 13,528, the Earl claimed, in virtue of a Crown charter of the Earldom of Orkney, with pertinents as well by sea as by land (wreck and ware being specially mentioned), the wreck and ware on the shore adjacent to the lands of Newark, which were held by Mr Covingtree from the Crown, with a clause of pertinents. The possession, so far as regarded the ware, was divided. Mr Covingtree's title, which, it is to be observed, was not a barony one, was earlier, and he pleaded that the seashore, "though still common for the uses of navigation, is understood to be *inter regalia*, and the property thereof may be given by the Crown to a subject." "The Earl's charter (we still quote from the pleading) contains some lands bounded by the sea, and so far he may have right to the shores, but as Newark has a grant from the Crown not only of his lands lying next to the sea, but of the wreck and ware on the shores thereof he has thereby an exclusive title to the shores adjacent to his lands." Effect was given

* Broom's *Legal Maxims*, ch. ii. Allen's *Inquiry into the Rise and Growth of the Royal Prerogative.*

to this claim of exclusive property. "The Lords found that the Earl of Morton has no right to cut ware or tang for making kelp on the rocks or shores of Newark and Air." The prior case of *Bruce v. Rashiehill*, in 1714, M. 9342, related to sea-greens, which term, in its usual acceptation, is applied not to the shore proper, which every tide covers, but to those reaches of land behind the shore which are covered only at high tides. It is noteworthy, however, that the reporter Bruce mentions that these greens were, "*for the most part, every tide*, and in spring and high tides entirely overflown," so that they seem to have consisted both of foreshore and sea-green. In this view the decision, which found that they were not *inter regalia*, and were not established as a separate feu by Charter of Novodamus, in which they were granted nominatim "unâ cum terris vulgo, the haill sea-greens," but that sea-greens may belong to the neighbouring heritors as part and pertinent of their lands, has evidently a direct bearing upon the question under discussion. Erskine's comment upon this decision—"by our constant practice proprietors who border on the sea enclose as their own property grounds *far* within the sea-mark," (Inst. II., 6, 17,) shows that he understood it to apply to the foreshore. This passage is, besides, the best evidence of the understanding of landowners and lawyers at its date* relative to the property in the shore. The supposition that Erskine is here stating a practice contrary to law is unreasonable. By far the most important case, however, prior to modern decision is *Innes v. Downie*, 27th May 1807, Hume 552, in which a bank of shelly sand, contiguous to the shore, and covered by the sea in ordinary tides, was found not to be *inter regalia*, and to belong as a pertinent to the adjacent lands. The lands here were an integral part of a barony, and although a portion of it had been sold would have retained the privileges (see on this point the opinions of Lords Hermand and Bannatyne) of a barony, and so have carried the bank even if it had been amongst the lesser regalia; but the opinion of the President, Sir Islay Campbell, and Hume's rubric, show distinctly that that was not the ground of judgment. "The question," the President remarked, "is, is this a *regale*, or a common right? I think not. Property of land adjacent to a heritor's shore is not a *regale*. Rocks with sea-weed and the like are pertinents of the adjacent property without a royal grant. This was found so here some years ago in a ques-

* 1773.

tion between Lord M'Donald and the Laird of M'Leod as to a multitude of rocky islands near the shores of Skye. His property of the shore is subject to the risk of being impaired or destroyed by the sea; and, on the other hand, has the advantage of gaining on the sea *alluvione*, provided always he do not impede the use of navigation, which is the single restraint of his right." Not the slightest countenance is here given to the theory recently hazarded, that the shore is to be considered as an accessory of the sea rather than of the land; on the contrary, even the land beyond the proper shore gained by regress is treated as an accessory of the adjacent lands. This decision was recognised a few years later in *Erskine v. Magistrates of Montrose*, 7th Dec. 1819, Hume 558, where the same eminent judge spoke of the "ordinary right of an heritor on the shore to embank and gain on the lands." It was not necessary, however, to rest upon that right in this case, as the pursuer, Miss Erskine, had a special grant in her charter of the Sands in the Basin of Montrose, the right to dig bait in which was the subject of controversy.* In neither of these cases is any distinction drawn between barony and other titles.

We shall now turn to some of the most important modern decisions, which show that President Campbell's doctrine has been fully acknowledged by his successors. In *Macalister v. Campbell*, 7th Feb. 1837, 15 S., 490, a grant of lands on the sea-coast, (not erected into a barony) with parts and pertinents, of which the sea was *de facto* the boundary, was held to carry the sea-beach as part and pertinent, and to entitle the owner to exclude a neighbouring proprietor from gathering sand and kelp on it unless he could prove a prescriptive servitude entitling him to do so. Lord Gillies in his judgment observed—"It is said that the pursuer's titles don't describe his property as bounded by the sea. I cannot help thinking that this is of little consequence if *de facto* the sea is the boundary. Suppose a conveyance was taken to the island of Stronsay, and that it was not described as bounded by the sea in the same way as here, would the Court hold that the disponee

* The effect of this charter was recently drawn in question for the second time in a case of interdict, in the Sheriff Court of Forfar, against persons who walked on the sands for the purpose of fowling. The decision of the Sheriff was in their favour. Had the case come before the Supreme Court, two interesting questions would have arisen—whether the shore of a land-locked saltwater bay is in exactly the same position as the seashore, and if so, what are the extent of the public uses of the shore?

had no right to the sea-coast? I imagine not, and I doubt if any of the gentlemen of the west have a better title than the pursuer to this source of revenue."

The case of *Paterson v. M. of Ailsa*, 11th March 1846, 8 D., 752, was the converse of that last quoted. Paterson claimed, as one of the public, a right to gather sea-ware *ex adverso* of the Marquis's lands, and that without averring prescriptive possession. The Court unanimously repelled this claim. It is true this judgment was not based upon a right in the Marquis of property in the shore; but Lord Wood † and Lord Moncrieff expressed a clear opinion in favour of such a right, although they allow, as we have seen President Campbell also did, that it would be subject to the public uses. Lord Justice-Clerk Hope and Lord Medwyn do not give a distinct opinion on the point, regarding it as unnecessary to the decision of the cause. Lord Cockburn stands alone in this as in another case presently to be referred to, in the view that the shore, unless expressly granted, remains the property of the Crown, and is, so far as we are aware, the only Scotch judge whose authority can fairly be quoted in favour of the Crown claims. The decision in this case ruled *Lord Saltoun v. Park*, 24th Nov. 1857, 20 D., 89, where a declarator of exclusive right as against the public to gather sea-ware *ex adverso* of a barony *de facto* bounded by the sea, was sustained. Doubts, it is fair to add, were expressed by two judges (Cowan and Benholme) as to the pursuer's right of property in the shore. No effect, however, was given to these doubts in a subsequent case before the same Division of the Court, ‡ *Nicol v. Blaikie*, 23d Dec. 1859, 22 D., 335, and we must suppose them to have disappeared, as it was a case eminently fitted to draw them out had they still existed. The pursuer, proprietor of the lands of Cairnrobin, described in his titles as bounded on the east by the German Ocean, brought a declarator and interdict against a neighbouring proprietor, who had entered on the shore *ex adverso* of these lands, and placed ring-bolts in the rocks between high and low water-mark for the purpose of salmon-fishing. The Court held that the pursuer had a good title to insist in the

† In Lord Wood's note will be found the most thorough examination of all the authorities to be met with in the whole range of decisions.

‡ The same remark applies to *Colquhoun v. Paton*, 17th June 1859, 21 D., 996, in which a proprietor was found entitled to interdict a steamboat company who attempted to land passengers on Sundays on a pier built partly on the foreshore adjacent to his land.

action, so far as directed against the defender's intrusion on his lands. The Lord Justice-Clerk (Inglis) in delivering the unanimous opinion of the Court, said—"Assuming the radical title of property to be inalienably vested in the Crown, the practical effect of conveying by a Crown Charter lands bounded by the sea is admitted by all. It gives the heritor the exclusive beneficial use and right of possession of the sea-shore between high and low water-mark, subject only to the primary and preferable public uses for securing which the property *ex hypothesi* remains vested in the Crown." We may venture to doubt whether the expression that the "title of *property*" remains vested in the Crown is happily chosen, unless by property is meant the paramount right of superiority which the Crown possesses over all the land in Scotland held by feudal tenure. The meaning of the passage, however, is quite clear; the only limitation of the heritor's right in the foreshore is the public uses of which the Crown is guardian: the "inalienable title of property vested in the Crown" is certainly not the right to alienate the shore now claimed by the Crown with so much eagerness that it has proceeded in many cases to alienate it before it was found to possess the right.

Before quitting the case-law it is proper to examine certain decisions and dicta which have been or may be referred to, as supporting the opposite view. It will, we think, be admitted that it would require strong authority to overthrow the consistent current of decisions in favour of the proprietor's right. Those quoted in favour of the Crown are few, far between, and easily susceptible of an interpretation agreeable to the view of the subject we are supporting. The two old cases quoted in Balfour's Sea Laws, under the heading "Anent the flude-mark,"* *The King v. Laird of Seafield*, 29th July 1500, and *Town of Craill v. Meldrum*, 24th May 1549, related rather to the extent of the public uses to which the shore was subject than to the right of property.

In the former the case of a special infeftment within the flude-mark, to which we have shown an inclusive bounding charter is equivalent, is excepted from the proposition that the neighbouring heritor cannot prevent any of the lieges from winning stone and gravel from the shore; and the case of Macalister proves that a *de facto* sea boundary to lands held by descriptive title, with clause of pertinents, is now, whatever may have been the case at

* Balfour's Practicks, 626; also in *Skene De Verborum Significationes*, voce. Ware.

the beginning of the 16th century, exactly in the same position. The latter, unless similarly explained, conflicts with that of *Erskine of Dun*, in so far as it holds gathering bait to be one of the public uses, but does not touch the present question. A leap has to be made to the end of the 18th century before another case can be found on this side of the argument, and that one which, as it did not obtain a place in the Scotch contemporary Reports, (now reported, 3 Paton, 626,) cannot have had much effect upon our law. We refer to *Smart v. Magistrates of Dundee*, 1797, 8 Brown's Cases in Parliament, 119, cited for the first time by Lord Brougham in *Todd v. Dunlop* in 1841. So far, however, is this case from lending any assistance to the Crown claims, that the only point it determined was the same as that in *Berry* v. *Holden*, a case from the same coast, viz., that the "*sea flood*" is a boundary excluding the shore. Just as little does *Todd* v. *Dunlop*, 2 Robinson's Appeal Cases 333 affect the present question. In that case it became necessary for the Clyde Navigation Trustees in carrying out their statutory operations to resume possession of a piece of ground *ex adverso* of Todd's feu, which they had previously recovered from the bed of the river. Todd's boundary was the river Clyde, a boundary analogous to the sea, which, as we have seen, has again and again been held to include the shore; yet his claim to this piece of ground was repelled both in the Court of Session and House of Lords. The reason is evident: the ground in dispute was not the shore but a portion of the bed of a navigable river, recovered not by alluvion, but suddenly by an artificial operation conducted for a public purpose. There was nothing, therefore, to change its former character of Crown property. Apart from this it is doubtful whether, even had this been a case of alluvion, Todd could have acquired the ground, as his feu was of specified measurement. The only remaining case is that of *The Officers of State* v. *Smith*,* 21st March

* *Cf.* a curious case in 1715, between the *Duke of Roxburgh and the Magistrates of Dunbar*, M. 10,883, the conclusion of which, as it seems to have been overlooked in recent discussions, we give in the words of the Report. "Found that the Duke could not run his dyke within the *littus maris*, and remitted to the Lords Ormistoun, Forglen, and Pencaitland to visit the ground and take probation how far the sea flows, and fix march stones, upon whose report the Lords found that the *littus maris* comes to the foot of the green line, and that there is no passage either for horse or cart betwixt the foot of that green line and the rock in the sea; and therefore that the Duke had right to build the wall of the enclosure upon the said rock, but with such steps over the wall within the *littus maris* as will allow a passage for

1846, 8 D. 711; but this decided merely that the Crown had a title to sue for protection of the public uses, and that running a wall across the shore which prevented passage along it was an interference with those uses. The dicta of the Lord Justice-Clerk (Hope) and Lord Cockburn no doubt go further, but were unnecessary to the decision. So far as the opinion of the former judge could be interpreted as recognizing the Crown's right of property in the sea shore, it was expressly disclaimed by him in the subsequent case of *Gammel* v. *Commissioners of the Woods and Forests*, 6 March 1851, 13 D. 854, and although we feel great respect for the varied ability of the latter judge, his opinion on a point of pure law cannot receive much weight in opposition to those of President Campbell, Lord Gillies, and Lord Moncrieff. It received however some support from the language of Lord Campbell, when *Smith's* case came to be heard on appeal, "that, notwithstanding some loose dicta to the contrary, there can be no doubt that by the law of Scotland as by the law of England the soil of the sea-shore is presumed to belong to the Crown by virtue of the prerogative, although it may have been alienated, subject to any easements which the public may have." Too much importance appear to us to have been attached to this opinion which, like Lord Cockburn's, is merely *obiter*. It does not necessarily mean more than that the sea-shore originally belonged to the Crown as feudal lord of all the land of Scotland. Nothing is said as to what is sufficient to constitute an alienation of the shore,—nothing inconsistent with its being alienated in the several ways we have explained. If the passage mean that the shore belonged to the Crown in any different manner from other land, or required for its alienation any peculiar kind of grant, it is refuted, not by loose dicta, but by repeated decisions. It cannot, however, be doubted that its interpretation in the latter sense has contributed to the impression which has even found occasional expression on the Scotch Bench in recent times that this is an open question* in the law of Scotland. If it be an open question, the foregoing survey of decisions in which, without pretending to be exhaustive, no case of importance has been omitted, has shown how when raised it must be concluded.

walking on foot upon the *littus maris* for the public use allenarly, and decerned and declared the Duke's right to property in these terms." Frequenters of Portobello sands may congratulate themselves that this case escaped the notice of Mr Smith's advisers.

* See Lord Curriehill in *Scrabster Harbour Trustees*, 19th March 1864, 2 M. 884; and Lord Justice-Clerk Inglis in *Baillie* v. *Hay*, 20th March 1866, 4 M. 625.

The result may be briefly stated. The Foreshore is not *inter regalia*. Even had it been so, it would not have remained Crown property in any case in which the adjacent land was erected into a barony. Stair, (ii. 3, 60,) and Mackenzie, (vol. ii., p. 300,) place the privileges of a barony somewhat higher than Erskine; but even Erskine admits (1) that possession of any part of a barony is reputed possession of the whole, and preserves to the baron his possession as entire as if it had been total; and (2) that the general conveyance of a barony is sufficient to carry all the different tenements which truly belong to it, or have been possessed as part and pertinent of it, though they be not specially enumerated (Inst. ii. 6, 18). Where the adjacent land is held by a bounding title, the Foreshore either goes along with it or not, according as the boundaries include or exclude it Where they exclude it, the property remains with the superior who granted the bounding charter, unless he himself holds under a similar exclusive bounding title. Where the adjacent land, whether or not a barony, is held with a clause of parts and pertinents, and is *de facto* bounded by the sea, the Foreshore belongs to the proprietor of such land provided he has possessed it. The nature of the possession necessary will vary according to the nature of the title and possession of the person disputing it with him. Exclusive possession for forty years will give an indefeasible title against all the world, even against a claimant with a specific grant of the shore. No possession will be requisite in competition with mere members of the public claiming anything beyond the recognised public uses.

On the other hand, this right of property in the Foreshore is held always under burden of the public uses of which the Crown is guardian. What these uses are it is beyond our present scope particularly to investigate, but the chief are the uses of navigation and sea-fishing. Whether the right of passage along the shore, and as a corollary of this the rights of bathing, fowling, and gathering bait or shell-fish * on it are so, is more doubtful,

* See *Hall* v. *Whillis*, 15th Jan. 1852, 14 D. 324; *Ramsay* v. *Kellies*, 4 B. S. 44, Tait's report, and 5 B. S. 556, cases under "Property" and "Alveus maris." In the case of the *Duchess of Sutherland* v. *Watson* (at present depending before the Second Division), in which the question is raised whether a Barony Title cum piscationibus is a title that will carry, or in which there can be prescribed, an exclusive right to mussels in the bed of the sea, the Lord Justice Clerk expressed in the course of the argument a doubt whether there was any right of passage along the shore except so far as necessary for navigation. On the other hand, Lord Deas, in *Darrie* v. *Drum-*

since these have been disputed in recent times, and as yet there has been no authoritative exposition of the law, and considerable conflict in the dicta and decisions. We intended to show that these results deduced from the cases are fully confirmed by the language of our institutional writers, but having already exceeded our limits, must content ourselves with referring to the leading passages.*

Æ. M.

Correspondence.

THE SCOTCH BAR AND THE COLONIES.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I remember having been very much struck with an article which appeared in one of your earlier numbers on the subject of Colonial appointments. The writer showed the reasonableness of sending English barristers to those colonies in which English law is administered, and Scotch advocates to those which are Dutch or French in their origin, and where accordingly a system of jurisprudence prevails, which, like the law of Scotland, is affiliated to the civil law. The Colonial Office at one time acted on this principle in the distribution of its judicial patronage, and after being in abeyance for many years it has been revived by Mr Patton.

I think I express the sentiments of every one of my brethren, when I say that the Lord Advocate deserves the thanks of the profession for using his influence with the Queen's present advisers to obtain a return to the old and undoubtedly the right system. True, Mr Patton has not yet had time to do much. The appointments placed within his gift are but small crumbs from the Colonial Office table; but Mr Patton has only been as many weeks in power as Mr Moncrieff was years, and I

mond, 10 Feb. 1865, 37 Jurist 245, 3 Macph. 496, said, "I think the sea shore, and every part of it, is undoubtedly a public place in this sense—that every man getting lawfully there is entitled to use it when he gets there;" and in *Duke of Argyle* v. *Robertson*, 17 Dec. 1859, 22 D. 241, the same judge observed, "Wherever there is food for human beings on the shore any man may go and take it, provided that he does not interfere with anything granted to another."

* Craig i. 16, 7; Stair ii. 3, 59, 60; Ersk. Pr. ii. 6, 5, Inst. ii. iii. 6, ii. 6, 17; Bell's Pr. § 639-47; Comm. Shaw's Ed., p. 722.

have no doubt, from his uprightness of character, kindness of heart, and utter unselfishness of disposition, he will ere long, if allowed to remain in office, do much more for his poorer brethren in the same direction.

The question occurs, if Mr Patton has been already able to do so much, why was Mr Moncrieff able to do so little? It has been said, "At least he did not send any fellow to Africa." But that is not an answer to the question, it is not even a palliation of the fault if there be a fault; it is simply a sneer at the results of the honourable zeal of the Lord Advocate. What, then, *is* the explanation? Was Mr Moncrieff indifferent in a matter which so closely affected the interests of the Scotch Bar? Impossible; he was Dean. Was he careless about giving places to any but his own immediate set, such as the Chief-Justice of the Mauritius? No! for on one occasion he signalised his return to power by making every liberal Advocate without exception, down to and inclusive of Mr John M'Laren, an Advocate-depute. Was the government of which he was a member unfavourable to our claims? This cannot be, for it has always been the boast of a Liberal administration that it uniformly eschews all jobbery, and finds the right man for the right place. Is it the fact that he had less influence with his chief than Mr Patton has with Lord Derby? I cannot believe it.

If, then, Mr Moncrieff had the power, the disposition, and the opportunity to do what Mr Patton has done, and nevertheless failed to do it, I repeat, How is the circumstance to be explained? After much cogitation on the subject I believe I have hit on the correct solution of this difficulty, and hasten to submit it for the consideration of your readers. If Mr Moncrieff had never been anything but Lord-Advocate, he would have attended to our interests in the colonies without fail. No doubt about that. But having been also appointed Dean of Faculty, he was so distracted by the cares of that office, that the matter always escaped his notice.

The moral, therefore, seems to be, that henceforth there should be a distinct understanding in the Faculty that *our Dean should never be permitted to wear silk*.—I am, Sir,

AN ADVOCATE.

EDINBURGH, *20th January* 1867.

The Month.

Printed Interlocutor Sheets.—The use of printed interlocutors in police courts has been attended with so few disadvantages and so many conveniences, that it is singular that no attempt has hitherto been made to extend the practice. The first step has now, however, been made in this direction in the Sheriff-Court of Forfarshire at Dundee, in which a printed sheet containing the usual interlocutors in the preparation of an ordinary cause, with the necessary blanks, has been in use during the past month. The interlocutors are printed on the first, third, fifth, and seventh pages of the sheets, and only on the right hand half of each page, the left hand half being left blank, except where there are given on the first and fifth pages, printed forms of consent to receive papers, and approval thereof by the Sheriff-Substitute, in terms of the 5th section of the Act, and the consent to close on summons and defences. The sheet begins with (1), the usual interlocutor adjourning the cause, which is followed by (2) the order for condescendence and defences in six and ten days; (3) a prorogation on special cause shewn; (4) interlocutors dismissing the action for default in lodging condescendence and defences respectively; (5) interlocutors allowing condescendence and defences respectively to be lodged on days specified on payment of expenses, the Sheriff-Substitute being satisfied that the failure to do so in due time arose from unavoidable or reasonable causes; (6) order for parties to meet the Sheriff-Substitute; (7) space for interlocutor closing the record, which the statute expressly requires to be in writing; (8) order to revise; (9) prorogation of period for lodging revised papers; (10) order for parties to meet Sheriff; (11) interlocutor appointing the record to be closed this day week; (12) space for interlocutor closing the record,—and interlocutor appointing debate; (13) two forms of order for proof. We believe the sheet has been drawn up on the footing that these are all the interlocutors which, in the ordinary case, can be properly pronounced in the preparation of a cause; and in the hope that two objects will be gained by its adoption, viz., that some trouble in writing will be saved to the Sheriff-Clerk, and more

especially that the interlocutor sheet will cease to be encumbered and deformed with absurd and unnecessary interlocutors, when both Sheriff and practitioners have before them a clear and simple form showing all that are really needed, and all that the statute contemplates or allows. We understand that the new system has been adopted under the best advice as to its legality.

Proposed Law School at Dundee.—Suggestions for the increase of the means of Education seldom originate with the persons for whom that education is intended; and such suggestions, when they are made, indicate, among those from whom they come, aptitudes and acquirements already existing, of the highest promise for the future. This is especially true of a movement which has been commenced in Dundee, to provide means for the education of the numerous law clerks and apprentices of that populous and thriving community. We have learned with the greatest satisfaction that an association has been formed under the title of "the Society of Law Clerks of Dundee," for the purpose of "the advancement of its members in Legal and General Knowledge;" and that a course of lectures on legal subjects by members of the Edinburgh and the local bar has been begun. The course of lectures in the first year must necessarily be desultory and unsystematic; but it may still be a stimulus to individual study, and a useful preparation for the more methodical and sustained exertions which, as the society hopes, may be made next winter. The utility of such lectures to young men employed in office work, cannot be better stated than in the letter addressed by the able Vice-President and originator of the Society to the Sheriff of the County, asking for his countenance in the undertaking. "No doubt," he says, "when a person enters a lawyer's office, the master, by the indenture, becomes bound to see that his apprentice is taught his business to the best of his ability. But a lawyer's business cannot be learned in an office. The practice and routine of the business is learned there, but it lies with the apprentice himself to acquire a thorough knowledge of the law at home." And he suggests as a means of inciting the young lawyers of Dundee to study for their profession "with a keener relish and more determined resolution," a short course of lectures in a popular style. Measures were accordingly taken, under the sanction and with the encouragement of the Sheriff and Sheriff-Substitute, for obtaining lecturers, and a considerable number of well qualified gentlemen both in Edinburgh and in Dundee, have

agreed to give their services in this way during the spring months. Lectures of course cannot communicate a complete knowledge even of the principles of law, but they are valuable in providing for the student guidance and encouragement. These benefits of course can only be obtained to the full extent where there is a regular course with examinations,—where, as was observed by a learned gentleman who is now lecturing "on the principles of Conveyancing," there is the incentive of emulation. But if there is to be "a permanent law school in Dundee," we must be allowed to express a hope that the Society of Procurators there will do much more than present a few prizes to be competed for at the end of the course of lectures. We venture to hope that that Society will follow up the beginning which has been successfully made by establishing, in co-operation with the Society of Law Clerks, a permanent lectureship. The principal law chairs in Scotland have sprung from the public spirit of such societies. In Edinburgh University, for example, the Chair of Scots Law grew out of a lectureship established by the Faculty of Advocates, and the Chair of Conveyancing from a lectureship maintained first by the Juridical Society, and afterwards by the Society of Writers to the Signet. We believe that it has been in the minds of influential persons in Dundee to endeavour to effect the removal to that city of a part at least of the University of St Andrews, at least of the Medical School, which suffers at present from the want of hospitals and of "subjects," and of adding a Faculty of Law which is now wanting in that University. Such a scheme may probably be realized, and it will materially contribute to this result, if a law school should already be in successful operation in Dundee, originated and supported by the voluntary efforts of the legal profession there. One more suggestion may be permitted. It will be impossible for a single lecturer to include within any reasonable number of lectures the whole law of Scotland, and the legitimate object of lectures would seem to be fulfilled if each year a tolerably extensive department of jurisprudence is treated of: *e. g.*, Commercial Law, Succession, Conveyancing, the Law of Property, the Law of Contracts, the Law of the Family, the Law relating to Actions, Pleading, and Process, &c. Let the lecturer, whether he is appointed for a single course, or for a longer period, not attempt too much, but thoroughly treat of a single subject, and he will confer greater benefit on his pupils and gain more credit himself.

Colonial Appointments for the Scotch Bar.—David Peter Chalmers, Esq., advocate, has been appointed chief magistrate on the Gambia River, Africa. Mr. Chalmers passed advocate in 1860. The salary is L.600 a-year.

Patrick Blair, Esq., advocate, has been appointed to a District Judgeship in Jamaica. There can be but one opinion as to the judiciousness of the Lord Advocate selecting Mr Blair for this responsible situation. Mr. Blair passed as advocate in 1856. While his departure to so distant a colony is a source of great regret to the numerous friends whom he leaves behind him, it is some satisfaction to them that the appointment which he has received may be only a step to a more important office.

Mr Charles Rampini, advocate, who passed in 1865, has also been appointed to a District Judgeship in Jamaica.

Since the preceding paragraphs were in type, Mr Harry Davidson, Advocate, has also been appointed to a District Judgeship in Jamaica. Mr Davidson is a Fellow of Oriel College, Oxford, and passed advocate in Dec. 1860. This also is an excellent appointment. To the conductors of this *Journal* it involves the loss of a valued fellow-labourer.

These appointments in Jamaica are worth L.800 a-year at present, with the prospect of an early advance to L.1000, and of the Chief Justiceship of the island as a possible prize in the distance. The Lord Advocate is entitled to the gratitude of his brethren of the Scotch Bar for obtaining for them some share of the professional prizes from which they have too long been excluded. The injustice under which Scotland has suffered in this respect was exposed by this Journal exactly ten years ago (Feb. 1857), and contrasted with the state of matters about a generation earlier. Since that article appeared, the only Colonial appointment given to a Scotch advocate has been the Chief Justiceship of Mauritius conferred on Mr C. F. Shand. The rights and interests of the Scotch Bar have been altogether disregarded by the Colonial Office, till Lord Advocate Patton generously and disinterestedly came forward to protect them. This matter cannot but be regarded with considerable interest; and there may be two or three different ways of looking at it. One view is presented in a letter which we give in another place. Our valued correspondent, however, has not noticed the difficulty which may exist, at times when the bar has not so redundant a supply of talent as at present, in finding suitable men willing to take appointments

abroad. Men generally enter this profession with the hope of obtaining distinction in their native country, and if their expectations have become less exalted after a few years of waiting in the Parliament House, they have probably by that time entered into relations which prevent them from willingly emigrating to Sierra Leone or Honduras.

THE ENGLISH REPORTS.—The *English Jurist* has been discontinued, being driven from the field by the new *Law Reports*. There have been rumours of a similar fate impending over the *Law Journal*, but its end is at least not likely to be immediate. The *Law Times* suggests that the Council of Law Reporting should purchase the *Law Journal* at a liberal price, both in justice to an enterprise "which is to be ousted not for its own defaults, but because the convenience of the profession was thought to require a publication possessing such advantages of shape, typography, and authority as to secure for it the unhesitating preference, and yet so like it in other respects that to take both would be a waste of money;" and also because the acquisition would transfer probably two thousand new subscribers to the Law Reports, and immensely increase their profits. We should be sorry if the *Law Journal* were indeed to be ousted, both because we believe that competition is wholesome where there is so large a field for it as in England; and because the *Law Journal* has hitherto been a most valuable reporter, and has been conducted in all respects at least as ably as the *Law Reports*.

LEGAL CHANGES IN ENGLAND.—The change of Ministry has been followed during the latter half of the year that has closed by an unusual number of legal changes. When Lord Derby took office Lord Cranworth was Chancellor, Sir R. Palmer Attorney-General, and Sir R. P. Collier Solicitor-General. These offices were filled by Lord Chelmsford, Sir Hugh Cairns, and Mr Bovill. These changes, and the similar appointments in Ireland and Scotland, were matters of course at the change of Ministry, but Lord Derby has had a "run of luck" in regard to judicial appointments as well as other kinds of patronage. The *Spectator* writes:—

"Lord Derby's legal appointments for the past six months are very nearly equal with those of Lord Palmerston during his six years' administration from 1859 to 1865. What the new Conservative Judges lack with respect to number is counterbalanced by the high positions which most of them have taken. In England Sir Fitzroy Kelly has been appointed Chief Baron of the Exchequer; Sir W. Bovill, Chief Justice of the Common Pleas; Sir Hugh Cairns, a Lord Justice of Appeal in Chancery; and a Vice Chancellorship has been given to Mr Malins. In Ireland, Mr Whiteside has been appointed Lord Chief-Justice; Mr John George, a Judge in the Court of Queen's Bench; Mr. Brewster, a Lord Justice of Appeal in Chancery; Mr Walsh, Master of the Rolls; Mr Lynch, a Judge in the Landed Estates Court; and Mr Miller, a Judge in Bankruptcy. Here, then, are ten judgeships in six months. Lord Palmerston, in six years, appointed thirteen judges, two chiefs and eleven puisne justices; Lord Derby, in six months, has had the nomination of a Chief Baron, two Chief Justices, two Judges of Chancery Appeal, a Master of the Rolls, a Vice-Chancellor, a Puisne Justice in a superior Court, and two Judges of the minor Courts. To effect these changes six judges have been placed upon the pension list—namely, Sir W. Erle, Sir F. Pollock, and Sir R. T. Kindersley, in England; and Mr Lefroy, Mr Hayes, and Mr Longfield, in Ireland. Two of the vacancies arose through the deaths of Lord-Justice Knight Bruce in England, and Mr Cusack Smith, the Master of the Rolls, in Ireland. The remaining two were caused by the promotion of Lord-Justice Blackburne to the Irish Chancellorship, and of Mr Lynch from the Bankruptcy to the Landed Estates' Court, in the same kingdom. The elevation of the new judges has caused the distribution of practice worth at least L.40,000 a-year amongst the members of the bar at Westminster Hall and Lincoln's Inn, and of from L.15,000 to L.18,000 a-year amongst the Common Law and Equity barristers of the Courts in Dublin.

"In connection with Lord Derby's unprecedented amount of legal patronage, it may be stated that the harvest is as yet by no means past. A bill is to be introduced into Parliament in the ensuing session, for the creation of three additional common-law judges; Lord-Justice Turner and Mr. Baron Martin have served the

requisite number of years to enable them to claim their retiring pensions, and a very few months will place Vice-Chancellor Stuart and Vice-Chancellor Wood in a similar position. It is somewhat remarkable that, amid all his good fortune in rewarding political adherents, Lord Derby at this moment has only one law-officer out of six in the House of Commons. That one is Sir John Rolt, the Attorney-General for England, who sits for West Gloucestershire. No seat has yet been found for Sir J. B. Karslake, the Solicitor-General; the seat of Mr Morris, the Irish Attorney-General, is formally vacant through his acceptance of office; Mr. Chatterton, the Irish Solicitor General, offers himself for the University of Dublin; and the Scotch Lord Advocate and Solicitor-General are both out of Parliament." We may add that in Lord Russell's Government all the law offices of the three kingdoms, including even the law adviser at Dublin Castle, were in the House of Commons.

FEES ON PRIVATE BILLS.—The fee on the filing of a petition or other document on private bills in the House of Commons is L.5 and L.15 on each of the three readings, as also on the report of the Committee. Out of the 317 bills for next session one firm has 74.—*Law Times.*

A MODEL BILL.—It is announced in different newspapers that the Private Bill Office has prepared a scheme as a model for private bills. It contains thirty-five clauses applicable to private bills in general, and a supplement of special clauses for certain bills of a special nature.

RAILWAY COMPENSATION.—The following sums were paid as compensation for personal injuries to passengers by the thirteen leading railway companies of Great Britain in 1865:—Caledonian, L.12,849; Great Eastern, L.21,996; Great Northern, L.22,387 (this sum includes also the amount paid for damage and loss of goods); Great Western, L.40,061; Lancashire and Yorkshire, L.24,708; London and North-Western, L.30,728; London and South-Western, L.25,000 (this sum includes also the amount paid for damage and loss of goods); London, Brighton, and South Coast, L.4504; Manchester, Sheffield, and Lincolnshire, L.6483; Midland, L.25,958; North-Eastern, L.14,355 (this sum includes also the amount paid for damage and loss of goods); North British, L.4621; and South-Eastern, L.70,726.

APPOINTMENTS.—George Monro, Esq., Sheriff of Linlithgowshire, has been appointed by the Home Secretary a member of the Board of Supervision during the subsistence of the Order of Privy Council of 5th December last, renewing the powers of the Board in regard to contagious diseases.

Charles W. Kemp, Esq., has been appointed Sheriff, and William Babtie, Esq., Commissary Clerk, of Dumbartonshire, in place of Mr Phineas Daniel, W.S. The net emoluments of these offices, according to the recent Sheriff Court returns were in 1863, as Sheriff Clerk, L.392, and as Commissary Clerk, L.92.

Mr Wm. Roy, Glasgow, has been appointed a Commissioner for administering the oaths of the High Court of Chancery.

OBITUARY.—The late Mr Phineas Daniel, W.S., Sheriff Clerk of Dumbartonshire, who has died at the age of seventy-eight, was at one time well known as a keen politician, the associate of Jeffrey, Murray, and Cockburn at the time of the Reform Bill agitation. He gave up his professional prospects in Edinburgh, where he had established a considerable business, and removed to London in order to promote the interests of the Whig party. In 1833 he was appointed Secretary to the Commission for inquiring into the condition of the Scottish Municipal Corporations, and in 1834 was appointed to the office which he held until shortly before his death.

George Brodie, Esquire, Advocate, Historigrapher Royal for Scotland, Editor of a valuable edition of *Stair*, and one of the few learned lawyers of whom the Scotch bar can boast, died on the 22d Jan. Want of space compels us to defer a fuller notice of Mr Brodie till next month.

DEEP-SEA FISHERY COMMISSION.—An International Commission has been appointed for the examination and adjustment of the questions connected with the fishery treaty with France. The French commissioners are M. Manceaux, Conseiller d'Etat, president; M. Herbert, M. Ozanne, M. Ame, and Capt. P. De Chapeaux, superintendent of the Office of Fisheries. The English Commissioners are the Right Hon. Stephen Cave, Vice-president of the Board of Trade—Chief Commissioner; George Shaw Lefevre, Esq., M.P., a member of the Deep-Sea Fishery Commission; Frederick Goulburn, Esq., Commissioner of Customs; and Capt. Hore, R.N., Naval *Attaché* to the Embassy in Paris. The chief points for consideration will be the

more precise definition of the seas to which the fishery convention will in future apply; the abrogation of legislative enactments with respect to the methods, times, and implements of fishing or dredging the deep seas, imposed by the regulations of 1843; the simplification of the method of trying offences by fishermen in the two countries, so as to avoid unnecessary delay and expense: and the opening of the ports of the two nations to the fishermen of either for the sale of fish, duty free.

JURISDICTION OF ENGLISH DIVORCE COURT.—Sir James Wilde has a very large idea of the jurisdiction committed to him by the Divorce Act, and subsequent Amendment Act (20 and 21 Vic., c. 85, and 22 and 23 Vic., c. 61). In the case of *March* v. *March and Palumbo* (11th December), he has decided that, where a husband obtains a divorce from a wife with whom he received considerable property, on account of her infidelity the Court may give a part of her income to the husband, and the issue of the marriage. The wife's income was about L.1400 a year, and the judge directed that L.200 should be appropriated to the education of a child, and L.400 be paid to the petitioner. "The relative amounts contributed by each party, the conduct of each, the total amount of their joint income, the relation it bears to the requirements of the parties, and their respective prospects of increased income, are all elements to be considered. But these elements are not capable of exact expression in figures, and the result must be a general one, and vary with the details of each case." The *Law Times* says:—"We take no exception to the judgment, but we must remark that the discretion which he assumes to exercise, wholesome as it may be, is certainly wider than the discretion exercised by a judge sitting in equity."

APPOINTMENTS—ENGLAND.—Vice-Chancellor Kindersley has resigned his office, and Richard Malins, Esq., Q.C., has been appointed his successor. Mr Malins was born in 1805, graduated at Cambridge 1827, was called by the Hon. Society of the Inner Temple 1830, and received a silk gown 1849. He sat in Parliament for Wallingford from 1852 to 1865, but lost his seat at the last general election. Sir William Bovill, Q.C., M.P. for Guildford, and Solicitor-General, has been appointed Lord Chief Justice of the Court of Common Pleas, *vice* Sir William Erle, resigned. John Burgess Karslake, Esq., Q.C., has been appointed Solicitor-General in his room.

COLONIAL.—George Trafford, Esq., barrister-at-law, to be Chief Justice of St Vincent. The salary is L.800 per annum. Mr Trafford was called to the bar by the Middle Temple in 1856.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Harry Davidson, Esquires, Advocates.)

FIRST DIVISION.

CLEPHANE, &c., *v.* MAG. OF EDINBURGH.—*Dec.* 5.

Charter—Mortification.

Terms of charters under which held that the University of Edinburgh had no right to share in the property of Trinity College Hospital.

Sequel of case reported 22 D. 1222, and 2 Macph. H. of L. 7.

DONALD *v.* DYCE NICOL—*Dec.* 12.

Property—Road—Obligation—Personal Bar—Title to sue—Assignation.

The pursuer was proprietrix of Bishopston in Kineardineshire. In 1853, the defender obtained permission from her stepson and author and his tutors and curators, to carry a road through part of Bishopston at his own expense, and he agreed at the same time by letter to pay "the amount of damages that may be found due to you by the Commutation Road Trustees, in payment of the land occupied by this road or otherwise." The road was made, and continued to be used for some years as a public road, but it was never adopted by the Statute Labour Road Trustees as a commutation road. It was brought under the notice of the trustees in 1853, and a committee reported favourably upon it; but owing to various circumstances, the matter was not concluded at the time, and the proceedings before the trustees were afterwards dropped by Mr Dyce Nicol. Within the last year or two Mrs Donald shut up the road; and in a suspension and interdict brought against her by Mr Nicol, it was decided in June 1865, by Lord Barcaple, whose judgment was acquiesced in, that she had a right to do so, as the road had never become a public road. She now sues Mr Nicol for the price of the ground, and to have the road fenced, &c., in terms of the agreement of 1853. The Lord Ordinary (Barcaple) held that the position the pursuer had taken up was inconsistent with the present contention, and sustained the plea of the defender that "the understanding on which the road was made having miscarried, and the pursuer having taken possession of the ground on which the road was constructed, the defender was not bound to pay for the value of the said ground."

The Court held that, looking to the whole proceedings before the Road Trustees, in the interdict process and in this action, it did not appear that the pursuer's conduct was with a view to the resumption of the ground and the extinction of the bargain. She had rather meant to say, "You have not fulfilled your part of the agreement, and till then I shall not allow you the use of the road." It was said Mrs Donald was not *in titulo* to maintain the action, in respect she had no good title to the land, or at all events to claim the compensation, because the trustees of the late Mr Donald,

with whom the transaction was entered into, were no party to the action. The property acquired by Mrs Donald from her stepson (which had belonged to her late husband, and had been conveyed to her by the stepson under a family arrangement after he became of age) did not, it was argued, comprehend this road; but the conveyance only carried the lands as possessed by her at the time, and the road was made before its date. Further, it was said that compensation was claimed for something done before the conveyance to her, and that the right to that compensation had not been transferred to her. The Court was of opinion that these defences also were not satisfactory. A road through a property conveyed was seldom excepted *in terminis* from the conveyance; and it was not clear that a proprietor had no interest in the *solum* of such a road. But there was an assignation to Mrs Donald executed since this action was brought, of all right of her author in the subjects conveyed. It was quite competent, where the substantial right to sue was in a person when he raised his action, to strengthen the title by an assignation obtained *pendente processu* (*Welsh* v. *Rose*, 1857, 19 D. 404). Neither was there anything in the contention that the compensation belonged to the estate of the father, for the agreement was made with young Donald and his tutors and curators, who had conveyed all his rights to the pursuer. There might be a question as to the mode of ascertaining the compensation. The Court was of opinion that this should still be done by the Road Trustees, and it might even be competent to them to fix the amount of interest and the claim for expense of herding while the road was being formed, also concluded for. The Court recalled the Lord Ordinary's interlocutor, allowing the pursuer expenses to this date, and stayed proceedings until January, that Mr Dyce Nicol might state what he proposed to do.

Act.—Sol. Gen. and Trayner. Agent—W. N. Fraser, W.S.——Alt. Clark and Adam. Agent—J. C. Baxter, W.S.

MELFORT CAMPBELL *v.* CAMPBELL.—*Dec.* 21.

Trust—Vesting.

Declarator, count, reckoning, and payment, at the instance of Mrs Anne Moore Campbell against the trustees and executors of Colonel John Campbell of Melfort, and against the marriage-contract trustees of the said Colonel Campbell and Mrs Louisa F. Ricketts or Campbell, and against others for their interest. The conclusions were for declarator that the pursuer had right to the lands of Kilchoan, and that the trustees should be decerned to convey said lands to her; that she had right to the furniture in Kilchoan belonging to Colonel John Campbell at his death; and that the trustees should be decerned to pay to her the annual profits of the said lands, furniture, and others, from 1st October 1861, when he died, to 26th May 1865; and further, and in any event, that she had right, under Colonel Campbell's will, to the residue of his estate to the extent of L.5000 sterling. Defences were lodged for Melfort Campbell, eldest son of the deceased Patrick Campbell, the truster's brother. Thereafter the trustees raised an action of multiplepoinding, with which the declarator was conjoined. The contentions of parties appear from the judgment of the Court, which was delivered by

LORD DEAS. By marriage-settlement in 1839, Colonel Campbell agreed to pay L.5000 to trustees, and a farther sum of L.5000 at his death, to be

liferented by his wife, if she should survive him, and failing children of the marriage, to go to his executors, administrators, and assigns. Colonel Campbell died 1st October 1861, leaving a trust-disposition and will dated 26th June 1861. This trust-disposition gave his widow the liferent use of the farm of Kilchoan, the furniture, &c., the fee of which is now in question, and appointed the residue of his personal estate, to the amount of L.5000, to be invested in trust for his nephew, A. F. Campbell, "who would then be the head of his family." The widow claimed the provisions under both deeds (the marriage-contract and the deeds of settlement); but the Court found, Jan. 14, 1865, 3 Macph. 360, that she could not take both. She elected to take the provisions under the marriage-contract, the consequence of which was to throw loose the rents of Kilchoan since the truster's death, as well as the possession of the furniture, &c., the widow being still alive. Meantime, Archibald Frederick Campbell, the nephew and heir-at-law of the truster, died on 18th July 1863, leaving a general disposition and settlement in favour of his mother, the pursuer. On 21st June 1865, the mother brought this action to have it found that the fee of the lands under the trust-deed and will had vested in Archibald Frederick, her son, and had been conveyed by him to her by his general disposition and settlement. On 28th November 1865, the trustees and executors under Colonel Campbell's deeds of settlement raised a multiplepoinding, which has been conjoined with Mrs Campbell's action. The Lord Ordinary has found in terms of the first, second, and third conclusions of the summons. It is not very easy to apply this to the summons; but parties explained that by the first conclusion was meant that relating to the fee of the lands of Kilchoan; by the second, that for a decerniture to convey; and by the third, that as to the fee of the furniture; and that it was not intended to decide as to the L.5000. Thus the Lord Ordinary meant to decide that the fee of lands and furniture vested in Archibald Frederick by his survivance of the truster, and was actually conveyed by him to his mother. The intermediate rents of Kilchoan are not disposed of by the Lord Ordinary. The question, therefore, remains open, whether these are intestate succession, and to go to the executors of the truster, or to whom. The question as to the fee of the lands arises under the Scotch trust, and the fee of the furniture under the will. Even if this were not the case, undoubtedly, in construing the one deed, we could not avoid looking to the other. They are of even date, and the one expressly refers to the other. When we look at the trust-deed, it can hardly be doubted that the truster's intention as to the fee of the lands is very obscurely expressed. The question is, Did the fee vest in A. F. Campbell by survivance of the truster or only by survivance of his widow? I think it tolerably clear, at whichever period it was to vest, it was to be an absolute fee. I don't think it is a conveyance with a substitution beyond the immediate disponee. A series of parties is mentioned, but certainly not in such a way as to prevent the heirs-at-law of the first who should take at the truster's death from succeeding. If the fee did vest in Archibald Frederick by survivance of the truster, and he had not disposed of it, it would have gone to his heir-at-law. But even if a destination of this kind had been introduced, the practical result is the same. Archibald Frederick had full right to dispone; and if he has done so, that would carry away the estate from any destination of this kind, just as if there were no destination at all. It is not at all surprising that there

should be no such destination. Kilchoan is not a landed estate of any importance. It is not a family estate, but a farm with a cottage residence. The only difficulty is, Did the truster mean the party who survived him or the party who survived his wife to get the fee? The strongest consideration against vesting is, that there is to be no actual conveyance of the lands till the widow's death. I am quite alive to the importance of the principle in *Donaldson's Trustees*, Feb. 11, 1862, 4 Macq. 319, that where there is a survivorship clause or an equivalent, it is to be referred to the period of distribution; and that if there is no life estate, we are to take matters as at the death of the truster; but where there is a life estate, we must hold that testator had in view the termination of that life estate. But while giving full effect to that consideration, we must take into account what else appears in the deed, in order to ascertain the intention of the truster. Here we have the declaration of a purpose, that the estate is to go to A. F. Campbell, "in case of his survivance of me," implying that the beneficial fee vested in him if he survived testator. Further down, we have a direction in case of the predecease of A. F. Campbell, or of the failure of heirs male of his body, to sell and apply the price in a certain way. It is not clear what is meant by the predecease of A. F. Campbell, but if it is to be consistent with what went before, it must mean predecease of the testator. All that is in favour of the view that the testator was contemplating the persons who should be alive at his own death. It is also remarkable that no other nephew is named who was past majority, and personally known to and in favour with the testator. But we must also look at the will. There is a little embarrassment from the Lord Ordinary not having decided where the fee of the L.5000 is, so that we can't do so either; but we must consider that question. The will creates a trust for behoof of the wife of the furniture, &c., to be delivered up at her death to the residuary legatee. That is to be done forthwith. The trustees are to lay out the balance for A. F. Campbell, who is to be residuary legatee; the trustees are to hold in trust for him, and his executors, administrators, and assigns; and if he die during the life of the testator, for the first and only son of A. F. Campbell, &c., whom failing, to certain other parties. The material thing is this, that not only are the trust-funds vested in the trustees for Archibald Frederick, but there is no trust for any one else, except in the event of his "dying during my lifetime." It seems perfectly clear that A. F. Campbell, having survived, became residuary legatee, and entitled to the L.5000 and the fee of the furniture under the will. If that be so, it leaves only this question, Whether it is most reasonable to suppose the truster intended the L.5000 and the furniture, &c., to go one way, and the lands another? It throws light on this if we remember that the lands are not the most important. The residue is a very important part of the estate, and it is not likely that he intended Archibald Frederick to get the one and not the other. This view is confirmed by the fact that the testator speaks of Archibald Frederick Campbell as "the head of my family if he survives me." Thus the will, in effect, gives the testator's own construction of what he meant in his first deed. If this be the right decision, that the fee is vested in A. F. Campbell according to the meaning of the testator, it does not trench on any principle of construction laid down in *Donaldson's Trustees*. For the details enable us to see that, though the conveyance was postponed, the testator intended vesting to take place at his own death. The only other

question is, whether the general disposition and settlement of A. F. Campbell has conveyed his right under Colonel Campbell's deeds to his mother. I have no doubt as to this. A. F. Campbell became fee-simple proprietor under a deed which would have made the subjects descend to his own heir-at-law; and it is clear that in such a case, his general disposition and settlement conveys that right to his disponee. It is quite a different question whether, where there is a destination which requires to be evacuated, such a general disposition carries the disponer's right; and that question might quite consistently be decided in one way and this in the other. His Lordship concluded by saying that the case of *Leitch's Trustees*, Feb. 17, 1829, 3 W. and S. 366, was a direct authority for the decision of this; that nothing was now decided as to the effect of the election made by the widow; and that the Court should alter the Lord Ordinary's interlocutor for the sake of clearness, and simply find that the fee of the lands and furniture had vested, and *quoad ultra* remit to the Lord Ordinary.

Act.—Young & Crichton. Agent—W. Waddell, W.S.——Alt.—Advocatus & Millar. Agents—Adam & Sang, S.S.C. Agents for Trustees, A. & A. Campbell, W.S.

CAMERON *v.* DOW.—*Dec.* 21.

Reduction—Fraud—Act 1621 c. 18—*Relevancy.*

Action by Cameron against the trustee of the late Allan Cameron, and against the widow and children of Cameron, concluding for reduction, under the Act 1621, of a trust-deed granted by Cameron in 1847, and for count and reckoning of the estate and funds of Cameron intromitted with by the defender. The pursuer sued as a true creditor of Cameron for cash lent, and founded on a decree of the Court of Session in 1856 for L.108. The original condescendence did not aver that Cameron was insolvent at the date of granting the trust-deed; but a statement to that effect was added on revisal. The Lord Ordinary (Barcaple), referring to the cases of *Wood v. Dalrymple*, Dec. 4 1823, and *Bolden v. Ferguson*, March 6, 1863, 1 Macph. 522, dismissed the action. His lordship said that there were special grounds for not adopting the more lenient course taken in the latter case, because here there was not in the original summons any statement implying the existence of any other creditor of the deceased, and it appeared from documents in process that in 1847 only a very small amount of the sum in the decree, only L.14 or L.15, was due to Cameron. The pursuer had brought his action on the assumption that he was entitled to have the reduction whether Cameron was insolvent at the precise date of the trust-deed or not, and was not entitled to introduce a new ground of action on revisal. The pursuer reclaimed; but the Court adhered.

Act.—Scott. Agent—A. K. Morrison, S.S.C.——Alt.—Moncrieff. Agent—John Ross, S.S.C.

LEIGHTON *v.* LINDFIELD.—*Dec.* 21.

Promissory Note—Fraud—Onerosity.

Advocation from Stirlingshire. Lindfield sued upon a promissory note for L.44, said to have been granted by the advocator to a party with whom he was in partnership, and who endorsed to Lindfield. Defence that the

note had been impetrated from the advocator at the time that he was making a written acknowledgment to his partner of the state of the company's affairs, and that through his partner Somerville's fraud, he really signed a different document from what he believed himself to be signing. After proof the Sheriff-Substitute found that the defender had failed to establish his averment so as to overcome the presumption of onerosity, and decerned for the amount. The Sheriff adhered. The Court (Lord Deas diss.) adhered. Although there was a good deal of suspicion of unfair dealing in the evidence, it would not justify the Court in refusing to give effect to the general rule that a promissory note is an *ex facie* absolute obligation. Lord Deas was of opinion that it was clearly made out that the note had been obtained upon false representations. The onerosity or the probativeness of the document was not in question: the only question was, whether the document was a true one, and he thought not.

Advocation refused.

Act.—A. R. Clark & Lancaster. Agents—H. & A. Inglis, W.S.—— Alt.—Watson & W. A. Brown. Agent—Alexander Cassels, W.S.

CARNEGIE *v.* GUTHRIE.—*Dec.* 22.

Lease—Singular Successor—Miscropping.

Carnegie brought this action of damages for miscropping against Guthrie, who had been tenant from 1844 of a farm, part of which the pursuer bought from Lord Kintore in 1861. Guthrie's lease expired in 1863. The lease was constituted by missives referring to "general conditions." These required the tenant to follow a five-shift course of cropping, and provided that a tenant wishing to adopt a four-course shift, or any other course of cropping, on any part of his farm, should "signify his intention to the proprietor and obtain his permission." Carnegie alleged that in the two years subsequent to his purchase of the farm the defender did not sow grass seeds in certain fields, so as to have one-year old grass in them in 1862 and two-year old grass in 1863, whereby he had suffered damage. The defence was that at the time he was cultivating his farm under a four-course shift with the knowledge and approval of the pursuer's author, Lord Kintore, which were binding on the pursuer. The Sheriff-Substitute found the defender liable; but the Sheriff (Heriot) reversed. The pursuer advocated; and the Court adopted the Sheriff's view. It appeared that from an early period of the lease the tenant had deviated from the course prescribed in the conditions. He was an "improving tenant"—having increased the arable land on the farm from 350 or 400 acres to 800; and it was proved that the execution of these improvements was not compatible with the regular adherence to the five-shift rotation. The course latterly followed by the tenant was also well known to the former landlord and his factor, and permitted by them. The purchaser, Mr Carnegie, was put on his inquiry by the terms of the conditions of lease, and should have ascertained at first what course of cropping was permitted.

Act.—Sol.-Gen. and Gifford. Agents—Russell & Nicolson, W.S.—— Alt.—A. R. Clark and Hall. Agent—James Webster, S.S.C.

TASKER *v.* SHAWS WATER COMPANY.—*Dec.* 22.

Obligation—Reparation—Company—Director.

Action of declarator, adjudication, and damages, on the ground that the Company had refused to grant the pursuer a conveyance of a piece of land on the west side of Regent Street, Greenock, which, he says, the Company agreed by a minute of sale to sell to him. There was a proposal by him to buy and an agreement by the defenders to sell. But when the deed came to be granted, the Company had begun to entertain doubts as to their power to grant an effectual disposition; to doubt, in fact, whether the ground in question really belonged to them. In consequence of these doubts, certain alterations were made on the proposed disposition, to the effect that the Company could not hold themselves out as heritable proprietors, and did not grant absolute warrandice, but only a conveyance in such terms as were consistent with the right they might be found to possess. Tasker struck out these alterations on the draft conveyance; and in this position of matters this action was raised, concluding that it should be found that the Company were bound to grant a disposition in the usual form, or that, if they failed to do so, they should be found liable in damages, and that adjudication should be granted if necessary. Defence that the Company were not satisfied that they were proprietors, that in fact they were not, the piece of ground really belonging to Sir M. S. Stewart; also that Tasker was a partner, indeed Vice-Chairman of the Company, at the time of the transaction, which was therefore altogether illegal and improper; further, that they had been led into the transaction by his misrepresentation; that he had had long experience in the affairs of the Company, and that when some members were dubious as to their property in this piece of ground, and put the question to Tasker, he had assured them that it belonged to the Company, and so led them into the difficulty.

A proof was led, and the Lord Ordinary (Jerviswoode) found that in respect of the position in which Tasker stood towards the Company, and the part he took in promoting the resolution of the Company to convey the subjects to himself, he was barred from insisting in the present action; sustained the defences and dismissed the action. The pursuer reclaimed.

The Lord President said that the main question was whether the piece of ground in question was or was not part of the subjects conveyed in 1827 to the Company by Sir M. S. Stewart for particular purposes. His Lordship examined at some length the conveyance and relative plan; and upon the construction of these came to be of opinion that the Company had no control over the ground, and no title enabling them to give it out in feu to Tasker. It was out of the question to require the Company to give a conveyance with absolute warrandice. As to damages, the Company said they were not liable, because they were not to blame if Tasker had suffered loss by the transaction, in so far as he did not make profit which he expected to make, and sustained actual loss by having built a wall on the faith of it. His Lordship thought it a sufficient answer by the Company, that if they had agreed to sell what they had no power to convey, Mr Tasker could not complain of that, he having, as their Vice-Chairman and Director, advised them that they had such power. His Lordship, however, was not quite prepared to adopt the contention that it was irregular and illegal for one of their own Directors to buy from them.

Lord Curriehill concurred.

Lord Deas concurred in the result, on the ground that Mr Tasker, as an official of the Company, was disqualified from selling to himself as an individual; he could not both buy and sell the same thing.

Lord Ardmillan differed; holding that the transaction was not illegal, and that the Company had laid themselves under an obligation to convey.

Absolvitor. (Note for Reference—Clark on Partnership, p. 209).

Act.—Clark and Lee.—Agents—Murray & Beith, W.S.——Alt.—Young and N. C. Campbell. Agents—Patrick, M'Ewen, & Carment, W.S.

WALLACE *v.* HENDERSON.—*Jan.* 11.

Reparation—Relevancy.

Action of damages laid on the allegations (1) that the defender agreed to lend a certain sum to the pursuer, and failed to do so, in consequence of which the pursuer suffered loss in his business; and (2) that the defender agreed not to call up the sum in a bond over the pursuer's property till the stipulated advances were made, and in violation of the agreement put the bond in force. The Lord Ordinary (Kinloch) reported proposed issues, expressing his opinion that the action was not relevant.

The Court concurred in thinking that, while it was possible to conceive a case in which a person agreeing to advance a sum for a particular object, and failing to do so, might be liable in damages, no case of that sort was set forth here, where the alleged agreement was to "credit the pursuer from time to time for cash and goods to be advanced and furnished;" and that as regards the second branch of the case, it could never be a ground of damages that a creditor enforced a just debt after the term of payment.

Act.—Lee and W. F. Hunter. Agents—Hamilton and Kinnear, W.S.——Alt.—Clark and Macdonald. Agents—Horne, Horne, and Lyell, W.S.

ADAM *v.* GRIEVE, &c.—*Jan.* 18.

Statute—Election of Water Trustees.

Suspension and Interdict at the instance of certain members of the Police Board of Greenock, against Grieve and others, claiming to be water trustees, and to constitute, along with two of the complainers, Ballantyne and Neilson, "The Water Trust of Greenock," under the "Greenock and Shaws Water Transfer Act, 1866." The object of the suspension was in effect to challenge the validity of the election of the respondents as water trustees.

The 10th sec. of the Act directs that "the Board of Police appointed under the Greenock Police and Improvement Act, 1865, and which Board consists of the Provost and four Bailies, and remanent members of the Town Council for the time being, and of nine elective members chosen under the provisions of the Police Act, shall at their first meeting after the election of elective members in the year 1866, and at their first meeting after the annual election of elective members in each year thereafter, in the manner prescribed or authorised for the election or appointment of committees of the said Board, elect for the next ensuing year twelve of

their number to be water trustees, of whom seven shall be members of the Town Council, and five shall be elective members; and the water trustees so appointed shall go out of office at the end of a year from their being so appointed or reappointed." A meeting of the Board of Police was held on 20th Nov. 1866, being the first meeting after the first annual election of elective members, which took place on 13th Nov. At this meeting a list of parties qualified to act as water trustees was proposed by the Provost, and a counter list by Caird, one of the complainers. A vote being taken, the Provost's list was declared carried.

It was averred by the complainers, and substantially admitted, that, immediately after the election, the complainers Ballantyne and Neilson, who were two of the parties thus elected, declined to act, and no other members of the Police Board were then appointed in their stead. It was also averred by the complainers that Neilson intimated his intention to decline before the vote was taken; but this was denied by the respondents, and the extract minute produced bore nothing to that effect. The grounds of suspension were substantially two—(1) That the whole proceeding was illegal, because the vote was taken on a list of names put before the meeting as a whole, and not by a separate vote on the appointment of each individual in the list; and (2) that in respect of the declinature by Neilson and Ballantyne, and the failure to elect others in their room at the meeting of 20th Nov., the whole election was void, and no new election could be made till Nov. 1867.

The Lord Ordinary on the Bills (Mure) refused the suspension, and the Court, without hearing respondent's counsel, unanimously adhered.

The Lord President said that he must hold Neilson and Ballantyne to have been elected, because it appeared from their own statement that the Provost declared them elected; and having been elected, they might resign, and their places fell to be supplied, as provided in section 11 of the Act. Therefore, there was no ground for holding their declinature fatal to the election. But further, he thought the thing went deeper than that, and he was very doubtful of the power of two or three Commissioners to paralyse the statutes and render it inoperative. That point, however, was not before the Court. It was sufficient for the decision that there was here a valid election of a sufficient number.

Act.—Decanus & Mackenzie. Agents—Murray, Beith, and Murray, W.S.——Alt.—Young and Gifford. Agent—John Ross, S.S.C.

SECOND DIVISION.

ADAM AND KIRK *v.* TUNNOCK'S TRUSTEE.—*Nov.* 20.

Sequestration—Trustee—Appeal—Expenses.

A had for some years a cashier, who, on his assuming a partner, continued in the service of the firm. After the cashier's death, his estates were sequestrated, and A, and also the firm of which he was a partner, lodged separate claims on the estate. The grounds of these claims were, that the cashier had embezzled certain sums—in the first claim, when he was cashier to A; and, in the second, when he was cashier for the firm.

The trustee rejected both claims; but on appeal, his deliverance was reversed, and expenses given to both appellants. The case was now before the Court on a question as to these expenses. It was not disputed that the general principle in law was, that where a claimant, whose debt was disputed, succeeded in the litigation, and was found entitled to expenses, he could not have his claim diminished by the expenses of such litigation; but it was maintained that there were here two separate claims, both successful. While the first claim could not be subjected to any part of the expenses of its own litigation, it must, in common with the other creditors, bear its share of the expenses of the litigation with the second claimant, who in his turn must contribute to the expenses of the first. On the other hand, it was maintained, that the two appeals being identical in form and substance, and both having succeeded, there should be no deduction in either case. The Lord Ordinary (Ormidale) gave effect to the former contention; but the Court reversed. This was not a case of a number of creditors, with, it might be, separate and independent interests, uniting in support of some legal principle. Here the question was the same, the interest was the same, and the same inquiry was necessary to elicit the facts of the case. Expenses had been given to both parties in their appeal against the judgment of the trustee. Under these circumstances, they thought that no deduction should be made from either claim in a question with either appellant.

Act.—A. R. Clark & Mackay. Agent—A. Howe, W.S.——Alt. Pattison & Watson. Agent—Jas. Somerville, S.S.C.

DUKE OF BUCCLEUCH *v.* COWAN, &c.—*Dec* 21.

Jury Trial—Bill of Exceptions—Specific directions to Jury—Public and private stream—Nuisance.

This case came before the Court on a bill of exceptions taken by the defenders at the trial, which took place at last July sittings before a special jury. For the circumstances of the case *vide* 4 Macph. 475. The charge, as condensed by his Lordship, and the directions which the defenders requested, and his Lordship refused to give to the jury, are, as slightly abridged, in these terms:—

The Lord Justice-Clerk directed the jury, in point of law, that there was a marked distinction between the rights of proprietors on the banks of a public river and those of proprietors on the banks of a private stream. That the public rivers of this country are vested in the Crown for public purposes, and the uses which the proprietors or inhabitants on their banks may have of the water are entirely subordinate to these public purposes; but that in a private stream the bed of the stream is the property of the owner of the lands on the banks; that he is entitled to the uncontrolled use of the water, subject only to the conditions that he shall suffer it to pass undiminished in quantity, and unimpaired in quality, to his neighbours below; that these conditions, however, are necessarily subject to some modifications, because there is a certain unavoidable consumption of the body of the water, and that it is impossible to prevent running streams from receiving impurities from natural causes, and from causes incidental to the presence of inhabitants on their banks; but that an upper proprietor is not entitled to throw impurities, especially artificial impurities, into the stream

so as to pollute the water; that the lower proprietor is entitled to complain of such pollution as renders the water unfit for primary purposes; but that it will be a good defence that the stream has been from time immemorial devoted to secondary purposes, so as to supersede and abrogate the primary purposes. That it is not indispensable for each of the pursuers to prove that any one of the mills would of itself pollute the river; that it is sufficient, to entitle a pursuer to a verdict on any one of the issues, to prove that the river is polluted by the mills belonging to the defenders generally, to the effect of producing a nuisance to him, and that the defenders in that issue materially contribute to the production of the nuisance; but it is indispensable for each pursuer to prove that the river is polluted by the mills of the defenders so as to produce a nuisance to him independently of the production of any nuisance to the other pursuers; and that each defender against whom he asks a verdict materially contributes to the production of such nuisance to him.

The directions asked for were—

1. That the law does not regard trifling inconvenience; that, in determining the question in the issues, time, locality, and all the circumstances should be taken into consideration by the jury; and that in districts where great works have been erected, which are the means of developing the national wealth, persons are not entitled to stand on extreme rights, or complain of every matter of annoyance.

2. That under the terms of the tack of the carpet manufactory, granted by Lord Melville to Henderson & Widnell in 1847, Lord Melville is responsible in this question with the defenders for the use which has been made of the water by his tenants.

3. That under the terms of the tack of the carpet manufactory, granted by Lord Melville to Whytock & Company in 1834, Lord Melville is responsible in this question with the defenders for the use which has been made of the water by his tenants.

4. That none of the pursuers is entitled to a verdict against any one defender unless the jury shall be of opinion, in point of fact, that the matter discharged by such defender into the river pollutes the river within the property of such pursuer to his nuisance.

5. That if the jury are satisfied that the primary uses of the water are destroyed at Melville and at Dalkeith with the consent, or with the acquiescence of the pursuers, by causes arising below St Leonard's Mill, for which none of the defenders are responsible, they must find for the defenders on all the issues as far as regards the Duke of Buccleuch and Lord Melville.

After hearing counsel, Lord Cowan said that the directions given were sound in law, and, further, that the presiding judge had done rightly in refusing to give the specific directions asked by the defenders. The distinction drawn between public and private streams, and the statement in law as to the use which riparian proprietors were entitled to make of the water, were unexceptionable in themselves, and had received the sanction of many decisions since they were first defined in the Lochrin case (Bell's Cases, p. 338, 3 Pat. App. p. 403). The exception to the second part of the charge rested upon this fallacy, that, because a certain act did not of itself amount to a nuisance, though it materially contributed to its production, the act was therefore a matter of legal right. This proposition was opposed

both to law and common sense, and would be most dangerous in its consequences. The first direction asked, so far as not idle and unnecessary, was unsound in itself and inapplicable to the circumstances of the case. It was not true that a nuisance became legal if such nuisance was a public benefit; and, further, the manufactures in question were not carried on for the public benefit, but for private profit. There was no definition given as to what was meant by "extreme rights," and the only effect of such a vague direction would have been to distract the mind of the jury from the main question. As to the second and third directions, they were not such as to meet the case, which it was the avowed intention of the defenders to lay before the jury; they could only proceed on the assumptions that the carpet manufactories were of themselves a nuisance irrespective of the paper works; and, secondly, that the use made by the tenants of the water was authorised by Lord Melville, so as to make him responsible. There was no evidence that these manufactories were such a nuisance. On the contrary, the whole evidence went to show that the esparto grass was the principal if not the sole cause of nuisance; and it was a monstrous thing to say that one nuisance could not be got rid of because of the existence of another. The fourth direction had already been disposed of in the judge's charge. The fifth direction was objectionable—(1) Because no time was specified as to when the primary purpose of the water was destroyed; (2) because the jury had been already told that, if there had been a prescriptive usage of the water for secondary purposes, this would be sufficient to entitle them to find for the defenders—if it meant any more than this, it ought to have been the subject of a special issue; and (3) because the pursuers were entitled to proceed against all the sources of nuisance. The case would have been different if, as in the case of Lochrin burn, the river had been allowed to become a common sewer, so that the removal of another nuisance would have been useless. That was not the case here.

The other judges concurred.

Act.—Advocatus Sol.-Gen., Shand, and Johnstone. Agents—J. and H. G. Gibson, W.S.——Alt.—Decanus, Young, Gifford, Clark, A. Moncrieff, and Asher. Agents—White-Millar & Robson, S.S.C.; and Menzies & Coventry, W.S.

LEITH POLICE COMRS. *v.* CAMPBELL AND OTHERS.

*Process—Sheriff—Appeal—Competency—*25 *&* 26 *Vict. c.* 101 § 197.

The Commissioners of Police for Leith, under "The General Police and Improvement (Scotland) Act, 1862," gave notice in terms of that statute that North Junction Street, North Leith, being a private street in the meaning of the Act, and not being properly paved and levelled, it was their intention to have this done at the expense of the owners of the property fronting or abutting on the street; and, after a conference with the proprietors, they issued an order to that effect. Certain of the proprietors appealed to the Sheriff, who held that the street was not a private one, and the order was annulled. Against that judgment the Commissioners appealed, the summons containing both declaratory and reductive conclusions. The grounds of appeal were (1) that the Sheriff pronounced judgment without allowing proof or making due inquiry, and (2) that he did not apply his mind to the matter. By section 197 of the Act, the Sheriff's judgment is

declared to be final, and not revocable in any way or on any ground whatever. The Lord Ordinary dismissed the action as incompetent; and today the Court substantially adhered to that interlocutor. The Sheriff's jurisdiction was in their opinion privative, and not subject to review.

Act.. Sol.-Gen. & W. Ivory. Agents—Baxter & Mitchell, W.S.——Alt. —Advocatus & Pattison, Clark & A. Moncrieff. Agents—J. Lamond, S.S.C., and Scott Moncrieff & Dalgety, W.S.

BONES *v.* MACLAURIN'S TRUSTEES.—*Dec.* 21.

Title to sue—Decree dative.

Action by persons designing themselves executrices-dative *qua* surviving next of kin of Mrs John Maclaurin against the trustees under the will of the deceased John Maclaurin. The conclusions were for count, reckoning, and payment as to half of the goods in communion of Mr and Mrs Maclaurin at her death. At that date the next of kin of Mrs Maclaurin were not the pursuers, but her sister Mrs Bone, the pursuers' mother. Mrs Maclaurin was survived by her husband, who is now dead. The defenders pleaded that the pursuers did not represent Mrs Maclaurin's next of kin at the time of her death, and were not beneficially interested in her succession; and that the pursuers' title as libelled in the summons was contradicted by their averments on record.

The Lord Ordinary sustained these pleas and dismissed the action, holding that the goods in communion vested in the pursuers' mother, and were transmitted to her husband *jure mariti*, and that the pursuers' title could not avail, as the subject of the claim was no longer *in bonis* of the defunct.

The Court recalled this interlocutor, holding that the defenders could not get behind the decree-dative by way of exception; that it was competent, especially where there was no opposition, as was the case here, even for those not beneficially interested in a succession to an intestate to be confirmed *qua* next of kin; that the pursuers were entitled to be confirmed, though not the next of kin at the date of Mrs Maclaurin's death; and that the description of their title must be read to infer this.

Act.—Clark and Watson. Agent—L. M. Macara, W.S.——Alt.— Gifford and Paterson. Agents—J. and A. Peddie, W.S.

MACKINTOSH *v.* ARKLEY.—*Dec.* 22.

Process—Reduction—Competency.

A warrant authorising the confinement of the pursuer in a lunatic asylum was granted by the defender as Sheriff. This action, brought for reduction of that warrant, was dismissed, as incompetently laid against the present defender, who had no right to and no interest in the warrant sought to be reduced. The plea ought to have been stated as against satisfying the production.

Act.—J. C. Smith. Agent—J. Somerville, S.S.C.——Alt.—Shand. Agents—Macrae and Flett, W.S.

FELL'S TRUSTEES *v.* SCOTTISH PROVIDENT INSTITUTION.—*Jan.* 9.

Dean of Guild Court—Possessory Judgment.

This case originated in the Dean of Guild Court. The Scottish Provi-

dent Insurance Society, proprietors of No. 7 St Andrew Square, craved a warrant to alter a stair leading to the area in front of their property. Fell's trustees, proprietors of the tenement on the west, although not alleging possession, claimed the property of the stair under their titles, and contended that, the petitioners' title to their property being a bounding charter, they were not entitled to establish by possession a right to subjects outwith the charter. The Dean of Guild found that the petitioners had occupied the staircase for seven years and upwards on a title capable of including the subject, and that they were therefore entitled to execute the proposed alterations. The Court adhered, on the same grounds.

Act.—Advocatus and A. Blair. Agents—Hunter, Blair, and Cowan, W.S.——Alt.—Young and Webster. Agents—Morton, Whitehead, and Greig, W.S.

CRAWFORD'S TRUSTEES *v.* CRAWFORD.—*Jan.* 11.

Relief—Annuity—Heir and executor.

The defender, as nearest lawful heir of his brother, James Crawford, challenged and succeeded in reducing the trust-deed and settlement of the latter, in so far as it disposed of heritable estate. The question now before the Court was whether the defender was bound to bear the burden of paying an annuity provided by Mr Crawford in favour of his wife. The Lord Ordinary (Jerviswoode) held that he was. The annuity was heritable, as bearing *tractum futuri temporis*, and was therefore such as to form *ex lege* a debt against the heir in heritage of the granter.

The Court adhered, holding that, although the moveable estate in the hands of the trustees stood pledged as an additional security for payment of the annuity, and was, it might be said, cautioner for the heir's performance of his obligation, the heir had no right under the deed to be relieved of his proper obligation to pay the annuity. It was unnecessary for the pursuers to plead the doctrine of approbate and reprobate against the heir. His liability was the same as it would have been in a simple case of intestacy.

Act.—Clark and Fraser. Agents—H. and H. Tod, W.S.——Alt.—Sol.-Gen. and Nevay. Agents—Scott, Moncrieff, and Dalgety, W.S.

THE QUEEN *v.* CAIRD.—*Jan.* 18.

Exchequer—Special Case—Power to Amend.—16 & 17 Vict., cap. 88. Sect. 15.

By Sect. 15 of 16 & 17 Vict., cap. 88, it is enacted that "if any person shall let any horse for hire . . . . without having obtained a proper license for that behalf, or if any person shall at any one time keep to be let for hire, a greater number of horses or carriages than he shall *by such licence be authorised* to keep at one time to be let for hire,"—then follows the penalty.

James Caird, a hotel keeper, was on 2d March 1866, at the petty sessions held at Cullen in the county of Banff, charged with a contravention of the above section, in so far as he having on 1st Jan. 1866 a licence for two horses to be kept for hire, did at that date keep three horses for hire. Being convicted and fined £25, he appealed to the Quarter Sessions, who affirmed the conviction, modifying the penalty to £5. At the request of

the defendant, and in terms of 7 & 8 Geo. IV., cap. 53, sect. 8, a statement of the facts of the case was prepared by the justices for the opinion and direction of the Court of Exchequer. They stated that:—

(1.) The defendant held a license under the Act, authorising him, from 6th October 1865 to 5th January 1866, to keep at one time to be let for hire two horses; and he occasionally held a supplemental license for additional horses.

(2.) During the above period, four horses were kept by the defendant. Two to be let for hire, and the other two for labouring land, and occasionally let for hire when the other two horses were tired, and not let for hire.

(3.) (4.) (5.) (6.) These statements were to the effect that in Dec. 1865 the defendant was applied to for three horses, and refused to let more than two. That in Jan. 1866 he sent out three horses, but though offered, refused to accept, and did not receive hire for more than two.

The Court were of opinion that the case, as laid before them, had not been well stated; but at the same time, as they did not think they had any power to order an amendment, their duty was to consider whether the facts as stated were sufficient to justify the conviction. They thought that they were sufficient. The statements made in the 3d, 4th, 5th, and 6th heads were quite immaterial. They might have been important to negative a different charge from that made, but could have no effect in the present case. The foundation of the conviction was to be found in the 1st and 2d heads. The defender maintained that, while there might be here a good foundation for a charge for letting more horses than he was entitled to, there was nothing to justify the conviction for keeping more than he was entitled to. It was quite clear that there were two separate offences described in the 15th section of the statute. The difficulty was as to how these offences were intended to be distinguished. Had the essential difference been between letting a horse and keeping a horse to be let, they would have been prepared to give effect to the defender's contention; but they were of opinion that this was not so—that the essential difference was intended to be drawn between a person who had no license and one who, having a license, exceeded his powers under it. They thought that they had sufficient facts to warrant the finding that the defender kept horses in excess of the number allowed by his license. The keeping for hire might be proved in different ways, one undoubtedly competent way being by proving the fact of actual hiring.

Act.—Advocatus, Sol.-Gen., and Rutherford. Agent—The Solicitor of Inland Revenue.—Alt.—Young & Shand. Agent—J. Morison, S.S.C.

FORSYTH *v.* NICOLL.—*January* 19.

Poor—Right to demand Outdoor Relief.

This was an advocation from the Sheriff Court of Elgin. The advocator had been for several years in receipt of outdoor relief from the parochial board of Duffus. In June 1845, this relief was discontinued, and an offer made to him of admission to the Morayshire Union Poorhouse, which is a poorhouse erected under section 61 of the Poor-Law Act 1845, by Duffus and other contiguous parishes. The advocator refused this offer, and applied to the Sheriff-Substitute, who, on the ground that poorhouses erected under the Act 1845 were for the relief of the "aged, and other friendless,

impotent poor," and that this pauper did not come within the enumerated classes, he not being friendless, inasmuch as he had a wife able to earn her own subsistence, held that the Board was bound to furnish the pauper with outdoor relief. The Sheriff reversed, holding that there being no refusal of relief, the pauper's application to the Sheriff, under sec. 73 of the Act, was incompetent. Forsyth advocated; but the Court unanimously refused the note.

The Lord Justice Clerk said the contention was, that the relief offered to the advocator was not such as the Board could insist on his taking. This was founded on the preamble of the 60th section of the Act 1845. That preamble was too sentimental, and would have been better away. The important part of the section was the enacting part. The notion that poorhouses were introduced for the first time by Act 1845 was a mistake. They had grown up under the old law, for, having impotent poor to maintain, you must give them lodging as well as food. The question was, not as to the administration of the poor law, but whether any poor were entitled to outdoor relief, and this must be answered by an unqualified negative. The poorhouse was a legal test to every pauper. It was contended that poorhouses were only for certain classes of poor. That was a novelty. His Lordship was not aware of any class, not being "friendless, impotent, poor," who were legally entitled to relief.

Act.—Rettie. Agent—J. D. Bruce, S.S.C.——Alt.—Gifford and Spittal. Agents—Mackenzie, Innes, and Logan, W.S.

OUTER HOUSE.

(Before Lord Ormidale.)

BIRRELL *v.* BEVERIDGE.—*Nov.* 14.

Evidence (Scotland) Act 1866.

This was the first meeting for adjustment of issues, the order having been pronounced in July. As the case was somewhat complicated, it appeared to both parties more expedient that it should be tried before the Lord Ordinary under the new Act than by a jury, and they craved the Lord Ordinary accordingly. His Lordship of consent recalled the interlocutor ordering issues, and ordered the case to be tried before himself. His Lordship, in doing so, observed that parties should be aware of the course which he would expect to be followed in such proofs. There should be no conjunct proofs, although in very special circumstances a proof in replication might be allowed. The whole procedure should be continuous, and as nearly as possible as at a jury trial; and counsel should be prepared to speak as soon as the evidence was led.

Act.—J. G. Smith.——Alt.—Scott.

RODGERS' TRUSTEES *v.* BROWN.

Evidence (Scotland) Act 1866.

This was the second meeting for adjustment of issues. The defender asked the Lord Ordinary to recal the interlocutor ordering issues and subsequent interlocutors, and to appoint the proof to be taken before himself

with a shorthand writer, under the Evidence Act, 1866. The pursuers did not consent. His Lordship held that he had no power, without consent of both parties, to recal interlocutors already pronounced—although, if the application were made to the Inner House when the case was reported, it might possibly be granted. The Lord Ordinary took the case to report.

Act.—A. R. Clark and Adam.——Alt.—Campbell.

(Before Lord Barcaple.)

MP. ROBERTSON *v.* TAYLOR.—*Dec* 4.

Evidence Act 1866.

In conjoined actions a proof was led for one of the parties, in May, before a commissioner. Further proof was appointed to be led before the Lord Ordinary to-day. In moving for an adjournment, Shand stated that he wished to look at documents called for from a witness formerly examined, and to recover writings from other havers, before he was in a position to proceed with the proof. In granting the motion, Lord Barcaple observed that, in the view he took of the recent Evidence Act, it was not intended that the Lords Ordinary should have their time occupied in examining havers, but that that matter was to be dealt with as it stood before the passing of the Act. Writings should be recovered from havers before the day of proof.

Counsel for Robertson—Fraser. Agents—Murray & Beith, W.S.

For other Claimants—Gifford, Shand, and Lamond. Agents—Crawford & Simson, W.S.; James Webster, S.S.C.; and W. Mitchell, S.S.C.

REGISTRATION APPEAL COURT.

(Lords Kinloch and Ormidale).

GRAY *v.* PATERSON.—*Nov.* 21.

Renfrewshire.

Objection to qualification of Paterson, as owner of land. The land was 1½ acre of ground laid out for building, but not built upon, and of no agricultural value, but valued at L.290 as a building stance. In respect of this value, the Sheriff (Fraser) repelled the objection. The Court reversed, on the ground that the value contemplated in the Valuation Act is the actual present return derived from the subject.

HECTOR *v.* CLARK.—*Nov.* 21.

Renfrewshire.

Clark produced as his title a tack dated 1785, for 999 years. He had acquired right to it by conveyance to himself and his wife in conjunct fee and liferent, and was enrolled as proprietor. Objection that he was not a proprietor but a tenant, sustained by the Sheriff, who held, further, that he had no power to correct the qualification stated in the roll. The Sheriff's judgment affirmed.

SHARP *v.* CAZENOVE AND RICHARDSON.—*Nov.* 22.

Buteshire—Objection to joint liferent proprietors of subjects.

The Hon. G. F. Boyle granted to Cazenove and Richardson a convey ance upon the narrative that the former was "vice-provost and tutor of the Episcopal College at Cumbrae," and the latter "assistant-tutor of the said College," and that he had agreed to make over to them the subjects in question as an endowment for the said College. The dispositive clause was an absolute conveyance in liferent. It was contended that these gentlemen were not in the position of parish ministers or schoolmasters, who held offices recognised and known to the law; but that it was incumbent upon them to prove that they held office *ad vitam aut culpam*. The disposition in liferent was absolute in terms, but the narrative clause showed that it was only intended as an official liferent, and the parties should therefore be held bound to prove the terms of their appointment. This was the principle followed in the cases of dissenting ministers. Judgment of the Sheriff repelling the objection, affirmed.

GUY *v.* RESTON.—*Nov.* 29.

Renfrewshire.

Reston claimed as "owner of ground-annuals payable by P. B. and others." Objection that ground-annuals, constituted as those in question, were not heritable subjects within the meaning of the Reform Act, sec. 7, repelled, affirming Sheriff's judgment.

HENDERSON *v.* MAXTON.—*Nov.* 29.

Renfrewshire.

Objection to Laurence Maxton as proprietor of houses, on the ground that the subjects were not of sufficient value, if a third were deducted in respect of terce payable to the claimant's mother. The mother was not served or kenned to her terce. The Sheriff (Fraser) held that, as the widow was not served, the terce ought not to be deducted. The Court reversed, holding it enough that a terce existed. The right of the widow existed independent of the heir, and was as complete in a question with the heir in regard to the third of the property, as his right to the remainder, although service might be requisite to enable her to enforce it, and kenning to localise it. The statute says a party shall be regarded as owner whether his titles are made up or not.

HECTOR *v.* MARTIN.—*Nov.* 29.

Renfrewshire.

Objection to Martin as tenant and occupant, on the ground that he was not a tenant and occupant, but a servant (a factor) getting his house as part of his salary without paying any rent, repelled. It was a fact in the case that he could not be turned out of the house, except at the end of a yearly term. Distinction between this and cases of servants having a certain amount of house accommodation as part of their wages—as when a master gives his butler a lodge to live in from which he may be turned out at the will of his employer. The question was raised whether, in the event of

dismissal for misconduct, the claimant might not be turned out of the house between terms. Misconduct, however, was not to be assumed; and such contingent defeasibility, if it do exist, should not be taken into account.

SHAW STEWART *v.* HECTOR.—*Nov.* 29.

Renfrewshire.

Objection to Shaw Stewart as joint-proprietor, in respect that, if the feu-duty for which he was liable to the superior were deducted from the value of his qualification, the value was insufficient. Auld disponed to Angus part of certain subjects for which a *cumulo* feu-duty of £32 was payable, allocating on the subjects disponed £8 14s. 7d., as the proportion of feu-duty payable therefrom. This allocation was not confirmed by the superior till 15th September 1866—a few days before the case came before the Sheriff. Angus disponed to Shaw Stewart and two others. The Sheriff sustained the objection to value. Objected further, that, supposing the allocated feu-duty to be alone deducted from the rental, and not the *cumulo* feu-duty, it was yet to be deducted from the value effeiring to each of the three *pro indiviso* proprietors, being exigible by the superior from each of them severally. The Sheriff stated this objection without any judgment on it. The Court reversed the Sheriff's judgment, holding that they were only to regard the portion allocated and truly payable out of the subject claimed on. The statute required the deduction of the sum paid by any claimant "as a condition of his right;" and it was not reasonable to say that the *cumulo* feu-duty was payable as a condition of the right. There was, indeed, a contingent claim for it by the superior, who was entitled to proceed against every part of the original feu unless he had confirmed the allocation. Here, although the superior confirmed the allocation, the Court did not in the circumstances rest its judgment on that, which came a little too late to be of use. There was relief in a question between disponer and disponee; and that was the aspect in which this question must be looked at. This was not a question of feudal title, but of fair and reasonable construction. The object of deducting feu-duty was to ascertain how much the party was actually in the enjoyment of. The same principle applied between *pro indiviso* proprietors as in the case where a larger feu was subdivided.

TEIND COURT.

MINISTER OF STRACATHRO *v.* THE HERITORS.—*Jan.* 16.

Augmentation—Free Teind—Valuation.

The minister of Stracathro and Dunlappie asked for an augmentation of seven chalders, increasing the stipend to eighteen chalders. Last augmentation, 1815. Certain heritors opposed, on the grounds that too much was asked, and that there was no free teind. The minister admitted that, if a certain decree of valuation were good, there was no free teind; but it appeared *ex facie* of the decree of valuation that no one representing the benefice had been properly called in the process. The decree bore to

have passed in an action at the instance of certain heritors named Turnbull against the Earl of Southesk, as patron of the parishes, "and against the late incumbent and all present incumbents there." It was stated by counsel for the minister that the last episcopal incumbent died in 1695, and that Mr John Daly, factor of the titular and patron (Lord Southesk) whose prelatical predilections were matter of history, had been intruded for a few months. After this, however, the benefice was vacant till 1701, and in 1698 it was formally declared vacant by a committee of the Commission of the General Assembly, and by the Presbytery. It was clear from the decree itself that no one entitled to represent the interests of the benefice had been called in the process. The Presbytery of the bounds should have been called. The case of Morvern, 38 Jur. 49, was referred to, in which it had been stated by the Lord President that the proper course was to grant an augmentation, leaving all questions as to the existence of free teinds to be afterwards investigated. Besides, in the present case, the heritors objected to the amount of the augmentation asked, and it was only fair that the minister should know how much he was to get before he proceeded to dispute the validity of the decree. It might not be worth his while to do so if he was only to get a small augmentation. The Court pronounced an interlocutor in similar terms to that in the Kilbirnie case last Teind Court day (*ante*, p. 55), sisting the process of augmentation until the validity or invalidity of the decree of valuation should be ascertained in a competent action.

Act—A. R. Clark and Asher. Agents—W. H. & W. J. Sands, W.S. ——Alt. Gifford.

CIRCUIT COURT.

H. M. Adv. *v.* Robertson.—*Glasgow, Dec.* 1866.

Theft—Production of Stolen Articles.

Robertson was charged with housebreaking on three separate charges. Broadley, an accomplice in the thefts, had been tried and convicted for the same offences at the autumn Circuit: the stolen articles had been duly produced in that trial, and having been identified by the witnesses, and a conviction having been obtained, they were returned to the owners. At the trial of Robertson, the articles had not been lodged with the clerk, and were not produced for identification. The witnesses, however, spoke to having identified them at the trial of Broadley. The Advocate-Depute, at the recommendation of the Court, withdrew the charge, in respect to the two charges in the indictment, to which these circumstances applied. In the third charge, however, the circumstances were somewhat different. The article stolen, which was a coat, had not been lodged with the clerk; but the witness to whom it belonged appeared in the box with it upon his back, and identified it as the coat which had been stolen. Lord Ardmillan held that the circumstances implied a sufficient production of the coat.

ENGLISH CASES.

NEGLIGENCE (*Statutory Trustees.*)—Trustees appointed by statute for public purposes, with power to levy tolls, but not deriving any personal benefit, are liable in their corporate capacity for damage sustained through the default of their servants or agents to the same extent as absolute owners levying tolls for their own profit, although there is no improper conduct on the part of such trustees. So held in conformity with opinion of all the judges. Dictum of Lord Cottenham in *Duncan* v. *Findlater*, 1 Rob. App. 911, overruled. (H. of L.), 35 L. J., Ex. 225.

CONTEMPT OF COURT.—(*Barrister and Attorney.*)—The appellant, a barrister and attorney of the Supreme Court of Nova Scotia, and also a suitor in that Court, wrote a letter, as such suitor, to the Chief Justice, reflecting on the administration of justice in the said Court, and amounting to a contempt of Court. The Court suspended the appellant:—*Held*, that, although Courts of justice have power to remove their officers if guilty of crime or moral delinquency, yet, inasmuch as the offence was committed by the appellant in his capacity as suitor, and not as an officer of the Court, punishment by fine or imprisonment was the appropriate punishment, and the order suspending the appellant from practising in the Supreme Court reversed.—(*In re Wallace* 36 L. J., P. C. 9.)

CHURCH.—The Church of England in a colony which has an established legislature, and where no church is established by law, is in the position of a voluntary association. The jurisdiction of the bishop of a see erected in such a colony by letters patent, rests only upon compact, and is to be enforced through the lay tribunals, from which an appeal lies to the Sovereign in Council. A coercive jurisdiction is not so essential a function of such a bishop that the failure of the letters patent to create such a jurisdiction will deprive the bishop of his right to receive the income of a trust fund appropriated to the endowment of a bishopric founded by letters patent professing to create such a jurisdiction.—(*Colenso v. Gladstone*, 36 L. J. Ch. 2.)

COMPANY.—(*Contributory—Winding-Up.*)—A transfer of shares in a limited company was executed in Dec. 1865, but not lodged in the company's office till 2d March, 1866. An ordinary weekly meeting, at which it was the practice of the directors to pass transfers, having been held on the 2d of March, none could, in the regular course, be held till the 8th following. On the 3d, the directors resolved that no transfer then in the office should be registered without their express sanction; and on the 7th a winding-up petition was presented, on which a winding-up order was subsequently made:—*Held*, by the *Lords Justices*, aff. order of the *M.R.*, that the transferor remained a shareholder, and that the Court would not interfere to rectify the register, under the Companies' Act, 1862, s. 35. *In re Joint-Stock Discount Co.* (*Lim.*), *ex parte Shepherd*; 36 L. J. Ch. 32; 2 L. Rep. Eq. 564.

COMPANY.—(*Contributory—Directors.*)—The deed of settlement of a company provided that the directors should allot shares not subscribed for in such manner as they should deem best. Three directors formed a quorum:—*Held*, that a delegation of the power to two of their number and the manager was invalid. A, in reply to a circular offering reserved shares, accepted them on a condition. The directors had not their attention called to the condition, and passed no resolution as to it. They resolved, however, that undistributed shares should be allotted by two of them and the manager; and shortly after the manager wrote to A, saying that the shares accepted by him had been allotted to him. Upon the company being wound up,—*Held*, that A's name must be removed from the list of contributories in respect of the shares in question, there having been no acceptance of his conditional offer, and there being no mutuality, inasmuch as the shares, if considered as allotted under the resolution, had been improperly allotted. *In re Leeds Banking Co.* (*Lim.*) *ex parte Howard*, 36 L. J. Ch. 42; 1 L. Rep. Ch., App. 561.

COMPANY—(*Misrepresentation.*)—A statement true to the letter, but in substance a misrepresentation, put forward to mislead the public, is sufficient ground for cancelling an allotment to a person who had applied for shares on the faith of it. The prospectus of a company stated that more than half the shares were subscribed for, and that the company had contracted for the purchase of two estates, on one of which the vendor had expended a large sum in improvements. In fact, the chief promoter had agreed to take by himself or his nominees more than half the shares issued, but he had before allotment carried such shares into the market, and the directors had not required him to perform his agreement; the vendor to the company had not himself expended any sum in improvements on the one estate, though the person from whom he purchased had done so, and he had entered into merely a verbal contract for the purchase of the other estate:—*Held, per* Kindersley, V.C., that there were sufficient misrepresentations to entitle the plaintiff to have the allotment of shares to him cancelled. *Ross* v. *Estates Investment Soc.*, (*Lim.*,) 36 L. J. Ch. 54.

STAMP DUTY—*Benefit Building Society.*—A mortgage to the trustees of a benefit building society by a stranger to secure the repayment of money advanced to him out of the surplus funds, is exempt from stamp duty. *Thorn* v. *Croft*, 36 L.J. Ch. 68.

COVENANT.—*Public-house.*—A person, by taking out an Excise licence for the sale of beer "not to be drunk on the premises," does not break a covenant not to use his house as a public-house for the sale of beer. *Peace* v. *Coates.* 36 L. J. Ch. 57; 2 Law Rep. Eq.. 688.

COMPANY.—(*Winding-up.*)—In winding up a company by the Court, the official liquidator being of opinion that, out of claims made against the company to the extent of L.850,000, there would most probably be established debts to the extent of L.400,000, and there being no assets, the Court, acting on the information and opinion of the official liquidator, sanctioned a call, which was estimated to produce about L.180,000, before the validity of the claims was established. *Held*, per *L. Justices*, not necessary to wait till the exact amount of the debts shall be ascertained before a call can be made. *In re Contract Corporation* (*Lim.*), *ex parte Boyer*, 36 L. J. Ch. 69.

HUSBAND AND WIFE.—*Alimony—Costs.*—An attorney who has acted for a wife in a matrimonial suit, and has a claim for costs therein incurred beyond those taxed against the husband, has a lien for such costs on alimony paid into his hands on her behalf. *Bremner* v. *Bremner and Brett*, 36 L. J. Pr. and Matr. 11.

COMPOSITION DEED.—*Fraudulent preference.*—To a declaration containing the common money counts, defendant pleaded that by a composition deed entered into by himself and four-fifths in number and value of his creditors, under an act of the Legislative Council of New South Wales, he was released from all actions, &c., and that the deed had been executed by one of the plaintiffs in respect of the cause of action in the declaration mentioned. A replication on equitable grounds, after setting out the deed, alleged that defendant agreed with certain creditors, other than the plaintiffs, in consideration of their executing the deed, to give them certain benefits and preferences over the other creditors; whereby he induced them to execute the deed, which execution was procured without the knowledge or consent of the plaintiffs, and in fraud of the deed and of the plaintiffs.—*Held*, upon demurrer to this replication, that it was an answer to the plea, inasmuch as a composition deed cannot be binding, if it is not executed in good faith between the debtor and his creditors. *Dauglish* v. *Tennent*, 36 L. J., Q. B. 10.

MASTER AND SERVANT.—*Foreman.*—Plaintiff was in the employment of defendant, a maker of locomotive engines. He was ordered by defendant's foreman to get upon a travelling crane moving upon a tramway, and used in hoisting engines, and he obeyed. It was the first occasion of using the crane, and the first time that plaintiff was employed upon it. The piers supporting the tramway gave way,

it fell, and plaintiff was injured. There was no evidence of defect in the crane, negligence in the mode in which it was used, that the engine was of unreasonable or improper weight, that the defendant had employed unskilful or improper persons in building the piers, or that he knew of their insufficiency; neither did it appear that he had personally interfered at the time of the accident.—*Held*, setting aside a verdict for the plaintiff, first, that the foreman was not a deputy or representative of the defendant, but a fellow servant of the plaintiff, and that the rule that one fellow servant cannot recover for injuries sustained in their common employment by the negligence of such fellow servant, unless such fellow servant is shown to be an unfit or improper person to have been employed for the purpose, is not altered by the fact that the servant to whom the negligence is imputed is a servant of superior authority, whose lawful direction the plaintiff was bound to obey; secondly, that there was no evidence for the jury of personal negligence on the part of the defendant. *Feltham* v. *England*, 36 L. J., Q. B. 14, 2 L. R., Q. B. 37.

NEGLIGENCE.—Through a railway station there was a way used by the public, whether legally or illegally did not appear. One evening a female passenger on the platform was attacked by a strange dog; complaint was made to the officials; its removal promised; and the dog disappeared. About an hour and a half afterwards, the signal-man found him worrying a cat in the signal-box, near the platform, and kicked him out, whereupon the dog rushed away on to the platform, where people were getting in and out of a train, and bit plaintiff, a passenger, who sued the company for negligence.—*Held*, that there was no evidence of negligence to render the railway company liable. *Obs. per*, Willes J.—In order to show that there was negligence, it is not enough to show a state of things on which the damage has been caused, and which may have been in consequence of the negligence of the person who is charged with it; it is not enough to do that, even with the suggestion that no explanation, or no sufficient explanation, is given bysuch person of his conduct. It is necessary for the plaintiff, in the first instance, on undertaking to prove negligence, to show something which the defendants could have done and negligently omitted to do, whereby, if they had done it, the accident would have been avoided. In *Cotton* v. *Wood*, 8 C.B., N.S. 568, a person was riding a horse in a street at a walk, and the horse ran away, and, though the person did his best to keep the horse in, the horse injured a person walking along the street; and it was held, that those circumstances were not sufficient to establish negligence in the rider, because the evidence was that he did his best at the time, and was using the street properly, and without showing that he knew he was riding a horse which it was wrong to ride in a crowd, there was an absence of evidence of negligence. There, on its being insisted by counsel that at all events the evidence was sufficient to call upon the defendant to prove that he was riding a reasonably manageable horse, and on a case being cited for this purpose, the Lord Chief Justice said, "I entirely dissent from the doctrine that the mere happening of an accident throws on the defendant the onus of disproving negligence." The question has since arisen with respect to a case where the defendant is proved to have been doing an act which, if done in an ordinary and reasonable manner, would not produce injury, but in which damage has been done to a third person in the course of doing that act by some unforeseen event, as in the case of a person walking along a street near a warehouse, where sacks are being hoisted up to an upper floor, being injured by a sack falling on him. In such a case as that, the Court of Exchequer held that the fact of its falling under such circumstances was evidence of negligence; and that doctrine was affirmed in the Exchequer Chamber —see *Scott* v. *the London Dock Company*, 34 L. J., Ex. 220—and is quite consistent with, and distinguishable from, this case. That was a case in which the defendant had the control over and present property in something, which he was using in a manner that would be dangerous unless ordinary precautions were taken, though the thing under management would not be dangerous if precautions were taken. It is obvious that the fact of damage occurring would in such a case be some indication of negligence in the person doing it, though it would not be so in the case of something

over which the person had no control when he is accidentally or occasionally called upon to exercise reasonable care with respect to it; and that is especially applicable to the present cases where the dog which did the injury was not the dog of the defendants, the company, and was not a dog which they had a right to exercise any control over beyond turning it off their station. Unless there was negligence in not turning it off, there was none all. Here the evidence does not show that the defendants had any opportunity of removing the dog, or that they neglected through their servants to do so. I am therefore obliged to come to the conclusion that the rule ought to be absolute to enter a nonsuit. *Smith* v. *the Great Eastern Railway Company*, 36 L. J., C. P. 22.

WATERCOURSE.—*Riparian rights.*—An old mill had been worked since 1804 by water taken from a natural stream by a weir and goit (mill-lead) constructed by the original proprietor of the mill. The goit was made through the land of B., a riparian proprietor, under an agreement (not under seal) by which he was to receive an annual payment of 5s. for allowing the water to pass to the mill. The present occupier of the mill brought this action against the defendant, a riparian proprietor above B.'s land, for drawing off the water of the stream at a point above the weir.—*Held*, that the action was maintainable. Per *B. Martin.*—The right to have a flow of water through another man's land to work one's mill is the subject of property and of grant, and not merely of licence. And even assuming that, as the agreement was not under seal, sixty years' possession did not confer a good title as against B., yet the actual possession and enjoyment of the goit gave the plaintiff a valid right of action against the defendant, a wrongdoer. Per *B. Bramwell.*—The plaintiff was the grantee of a right or mode of enjoyment which it was competent to B. to grant to him; and as such grantee he could maintain actions against those who disturbed him. Per *B. Channell.*—The plaintiff was a riparian proprietor with respect to the goit, and had all corresponding rights to the water of the natural stream, though flowing in an artificial channel. (Note for reference. *Miner* v. *Gilmour*, 1 C. B., N. S. 590; *Hill* v. *Tupper*, 2 H. & C. 121; *Stockport Waterworks Company* v. *Potter*, 3 H. & C. 300.)—*Nuttall* v. *Bracewell* 37 L. J., Ex. 1.

NEGLIGENCE.—*Fellow-servant.*—A railway station, which was used both by the G. W. Company and the L. and N. W. Company, was under the charge of a servant of the L. and N. W. Company. A train belonging to the G. W. Company having been improperly and negligently shunted into a siding, injured the plaintiff, a servant of the L. and N. W. Company, who was there engaged in cleaning carriages.—*Held*, that the injury was caused by the negligence of the driver in the discharge of his ordinary duty to the G. W. Company alone, and not in the course of any common employment with the plaintiff; and that therefore the plaintiff could maintain an action for damages against the G. W. Company. *Warburton* v. *the Great Western Railway Company*, 36 L. J., Ex. 9.

STAMP DUTY.—*Conveyance.*—By an indenture reciting that a dissolution of partnership between two partners had taken place, and the share of the retiring partner in the assets of the firm had been found to be a certain specified sum, and an arrangement had been made, by which a portion of that sum was to be paid at once by the continuing partner, and the remainder secured by a mortgage of the partnership assets, the retiring partner conveyed to the continuing partner all his estate and interest in the partnership assets.—*Held*, that this indenture was a conveyance upon a sale within the meaning of 13 & 14 Vict., c. 97, Schedule, tit. "Conveyance," and was chargeable with an *ad valorem* stamp duty upon the sum payable to the retiring partner. *Christie* v. *the Commissioners of Inland Revenue*, 36 L. J., Ex. 11.

POOR-RATE.—*Game Lease.*—Where the owner of land occupied it himself, and leased to another the right of sporting and taking game thereon.—*Held*, that, in assessing the land to the relief of the poor, the value of the right of sporting and taking game ought not to be deducted in estimating the rateable value of the land. *Reg.* v. *Inhab. of Thurlstone*, 1 E. & E. 502, 28 L. J., M.C. 106, doubted. *R.* v. *the Guardians of the Battle Union*, Q. B., 36 L. J., M. C. 1.

THE

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THE FRENCH BAR.

(Continued from the August Number of the Journal.)

In the present and following articles we shall continue the history of the French Bar from the close of the seventeenth century until the French Revolution, which swept away the old *régime*, including the ancient Parliament and the Order of Advocates, which had been so long and so intimately associated with it. A great name, not absolutely belonging to the French Bar, but closely connected with it, meets us towards the end of the seventeenth century. That name is D'Aguesseau, than whom no one has ever understood and appreciated better the utility and importance of the profession of an advocate, or discoursed more eloquently upon its duties, privileges, and requirements. This eminent man was born at Limoges in 1668, and was appointed King's Advocate at the Chatelet of Paris at the early age of twenty-one. Soon afterwards he became Advocate-General to the Parliament, and was made Procureur-Général when only thirty-two—a success almost as rapid as that of the celebrated Grotius, who pleaded at the Bar when only seventeen, and was made Attorney-General of the Netherlands at twenty-four. D'Aguesseau's first discourse, delivered as Advocate-General at the age of twenty-five, has for its subject the independence of the advocate, and is throughout a magnificent and elaborate eulogium upon the Bar. In it occur these words since so often quoted: "It is an order as ancient as the magistracy, as noble as virtue, as necessary as justice; it is distinguished by a character which is peculiar to itself, and it alone always maintains the happy and peaceful pos-

session of independence." Of the advocate he says: "Free, without being useless to his country, he devotes himself to the public without being a slave to it, and condemning the indifference of a philosopher who seeks independence in indolence, he laments the misfortune of those who only enter upon public duties at the expense of their liberty." D'Aguesseau pronounced another famous oration in 1699 on "the causes of the decay of eloquence," which is deserving of attentive perusal; and, in 1716, composed instructions for the use of his son, which treat specially of the science of law, and in which he particularly recommends the study of the pleadings of the most eminent counsel, and attendance at the conferences of the Order of Advocates, as the best means of forming a young orator and a young magistrate. D'Aguesseau was a rare example of the happy union of great virtues and great talents. He was an admirable writer, a successful orator, an independent and upright magistrate. "We admire in his discourses," says an accomplished French writer, "an eloquence justly proportioned to the subject of which it treats; sublime in the most elevated; communicative and interesting in the simplest; a select erudition, a profound logic relieved and adorned with all the graces of rhetoric."

We now come to two of the greatest names of which the French Bar can boast—those of Normand and Cochin. Both were contemporaries of D'Aguesseau born in the same year—1687—and inscribed on the roll of the Bar, Cochin in 1706, and Normand in 1707. Normand rapidly achieved a high position, and was surnamed the "Eagle of the Bar." In person and countenance he was eminently handsome, his gestures were graceful, and his voice sweet and sonorous. All Paris flocked to hear his pleadings, and the highest personages sought the honour of his acquaintance. He lived like a nobleman; and his house, furniture, and equipages were of the most luxurious description. During the vacations he was in the habit of entertaining at his country house men of rank, philosophers, the most distinguished members of his own profession, and the most famous artists.

In short, he led a life hitherto unknown in an advocate, and far removed from the simplicity and frugality of the ancient Bar. Professionally, however, he was not only one of the ablest but one of the most honourable and conscientious of men. Nothing would persuade him to take up a cause which he believed to be unjust, and his scrupulous accuracy with regard to what he asserted was

so well known that the judges used to say of him, "Believe a fact at once when Normand attests it." Normand was a good writer and distinguished for his literary attainments; and Bussy-Rabutin, Bishop of Luçon, presented him to the French Academy, who unanimously received him as a candidate for admission into their body. It was, however, the custom, then as now, that the candidate should call upon the members of the Academy to solicit their votes; and Normand, considering this practice to be unworthy of the dignity of the French Bar, gave up the honour which it was proposed to confer upon him. He died in 1745, at the age of fifty-eight.

Still more celebrated than Normand was Cochin, inscribed on the roll of advocates at the early age of nineteen. His private life—unlike that of his great rival—was quiet and retired, and his religious opinions tended towards Jansenism. He was a splendid pleader, and very soon, after his first appearances at the Bar, acquired a high reputation and an extensive practice. In one of his earliest causes before Parliament, the opposite counsel —Julien de Pruay, one of the most powerful debaters at the Bar—had spoken first, but after hearing Cochin's speech he turned to Aubray, who was charged with the reply, and said, "It is for you to see how you will fight out your case a week hence; for me I confess I could do nothing but sob. Here is a man who comes up to the idea I had of eloquence. I believe him raised up to teach us how far its perfection can be carried." Of the same speech Normand remarked to Cochin that he had never heard anything so eloquent. To which Cochin happily and gracefully replied, "It is evident, sir, that you do not belong to the number of those who hear themselves." Cochin died in 1747, at the age of sixty, and in 1749 his principal works were published in six volumes 8vo. Nothing can prove more strongly the respect in which he was held by his contemporaries than the terms in which the approbation of the censorship was given. "The works of this great man are a debt due to posterity for the honour and instruction of the Bar, of which he was the chief and the model."

In the winter of 1717 took place one of those interferences by the Court with the dignity of the Order, which the French Bar were ever so prompt to maintain. It arose in the following way: An advocate named Sicault, who should have pled at the audience of the criminal court, was detained before the Parliament, and kept the judges waiting for some minutes; and when he at last

appeared, the President informed him that the Court had taken into consideration the propriety of interdicting him from the exercise of his functions, and it was through special favour that they had not done so. Upon this the advocates present immediately withdrew from the Court, and Arrault, then batonnier, along with two seniors called upon the President and stated to him the dissatisfaction of the Bar with this unjust reprimand, and their determination to practise no more before his Court unless he would make a public apology to the Order. The President saw that he had gone too far and promised that, at the next audience, he would make an ample explanation. Accordingly, at the time appointed, Sicault presented himself before the Court and explained what had taken place on the former occasion, after which the President said to him: "The Court will always put the best construction on what you have stated. It is convinced of your zeal and of your attention to fulfil the duties of your office; it is convinced that your conduct is regular; it will never fail to show, on all occasions, the consideration and esteem which it entertains towards your Order in general, and to yourself in particular."

The Bar was shortly afterwards engaged in a more serious and important dispute, in which it sided with the Parliament in its resistance to the edicts whereby the Regent Orleans had bestowed extraordinary and dangerous privileges upon the Scottish financier, Law. In 1720, the Regent, in order to restore in some sort the finances ruined by the system of Law, and the abuse of that system by parties in power, proposed an edict, granting to a company the monopoly of the trade with India. This edict Parliament refused to register; whereupon the Regent banished the Parliament to Pontoise, and the Palace was taken possession of by musqueteers, while the councillors received their letters of exile. The order of advocates, as usual, adhered to the Parliament, and refused to exercise their functions at Pontoise. In vain the Procureur-Général wrote a letter addressed to Babel, the batonnier, commanding them to plead at Pontoise. They answered unanimously, "that neither Babel nor the Advocates were bound to obey the orders of the Procureur-Général; that their function was free, and also habitual in the place where the Parliament was settled and free." At length the Parliament was recalled to Paris in December 1720, and resumed its duties as if no interruption had taken place. The First President warmly expressed his gratitude and that of Parliament to the

Bar, stating "that it would have been difficult not to appreciate their conduct, that it had received the applause which it deserved, and that it had even surpassed what might have been expected from them." In 1727, an advocate named Michelarm was erased from the roll of the order for having lent his name to a procureur, contrary to the ordinance of 1693, which regulated the writings reserved to members of the Bar, and forbade advocates to sign papers which they had not drawn up. This radiation was confirmed by Parliament.

The Bar took an active and prominent part in the discussions and troubles that arose from the famous bull *Unigenitus*, which attacked the liberties of the Gallican Church and condemned Jansenism, and which was a fertile source of strife and dissension in France, from the conclusion of the reign of Louis XIV. to the last years of that of Louis XV. Nevertheless it was accepted by an assembly of French prelates; royal letters patent ordered its execution; it was registered in June 1714 by the Parliament; and very severe measures were had recourse to in order to compel dissidents to submit to it. During the early part of the Regency the Regent, shewed himself unfavourable to the bull. But afterwards—either out of dislike to Jansenism, or urged on by his minister, Dubois, who was ambitious of obtaining a cardinal's hat—he made overtures to Rome, and took the bull under his protection; and, in 1720, it was accepted of new, and registered by Parliament. But after the death of the profligate Regent and his infamous minister, a consultation took place, arising out of a provincial Synod held at Embrun, for the acceptation of the bull, in which the elite of the bar—such as Normand, Cochin, Aubray, and Julien de Pruay—gave a strong opinion against it, dated January 1728. This opinion was drawn up by Aubray, and signed by fifty other advocates, and condemned the bull as containing propositions contrary to the liberties of the Gallican Church. In this matter the Bar seem, to some extent, to have departed from their ordinary functions, and to have assumed the right of protecting the interests of the State against the ultramontane doctrines. The result was that they were interdicted by the Royal Council, but the interdict was only maintained for a short period and then revoked by a second decree of the Council, so that the Bar issued triumphant from the struggle. In the following year, however, the Archbishop of Paris issued a charge condemning in the strongest terms the proceedings of the

advocates with regard to the bull. They, on their part, appealed to the Parliament which supported them, and forbade the publication of the Archbishop's charge; while the Archbishop, on his part, appealed to the Royal Council, and the result was a decree of 10th March 1731, by which the king ordered silence on the question, and forbade all further meeting and deliberation. But the calm which followed was of short duration. The Archbishop would not submit to the decree, and at his instance the Council of State issued a new decree in July 1731 by which, among other things, the King permitted the Archbishop to publish and distribute the obnoxious charge, so that the advocates found themselves again placed under the archiepiscopal condemnation declaring their consultation with regard to the bull heretical. Under these circumstances they met together, and, after two day's deliberation, decided that the Bar should cease its functions. On the 30th August, ten of the most active among them were exiled, and were followed in their banishment by the applause and good wishes of their brethren. The absence of the advocates from the courts was deeply felt, and the minister soon became anxious to terminate such an abnormal state of things. Overtures were made to Normand, whose high position at the Bar placed him on a footing with the most exalted personages. A decree of the Council pronounced the advocates "good and faithful subjects," the exiles were recalled, and business resumed its ordinary course. But during the following year, fresh troubles arose out of a new encroachment by the Archbishop on the privileges of Parliament and of the Bar. The king had again recourse to exile, and banished the councillors of the Court of Petitions and Court of Inquiry. But the advocates, by abstaining from the exercise of their functions, again compelled the Court to yield, and the triumph of the Order was ensured by the decree of 2nd December 1732, revoking that of 6th September, and recalling the exiles. Twenty years afterwards a similar dispute, with similar results, took place between the Archbishop of Paris—backed by the royal authority—and the Court of Parliament and the Bar. It also arose out of the bull *Unigenitus*. The Archbishop—Christophe de Beaumont—ordered that the succours of the Church should be refused to those who would not accept the bull; whilst Parliament, on the other hand, forbade the refusal of the sacraments for such a cause, and even went the length of ordering the arrest of a curate who had refused them. The Parliament

was transferred to Pontoise; but the advocates declined to plead, and there was a complete cessation of business. Again the king was compelled to cede to this passive and powerful resistance; and, on the 2nd September 1754, recalled the Parliament to Paris, where business was resumed amidst general demonstrations of popular satisfaction.

We shall now shortly notice some of the more famous advocates and jurisconsults of the latter part of the eighteenth century, beginning with Gerbier, whose eloquence and success equalled those of Normand and Cochin, the eminent pleaders whom we have already mentioned. He had great natural genius for oratory, which he had cultivated with the utmost assiduity, and the effect of his speaking was increased by his fine person, his noble gestures, and the touching quality of his voice. He was twenty-eight years of age before he began to plead, but his rare merit speedily placed him at the head of the Bar. Several specimens of his oratory, in some of the most important cases of the period, have been preserved, and are sufficient to give a very high idea of his excellence as an advocate. The latter part of his career was clouded by many chagrins. He allowed himself to be persuaded to plead before the Parliament Maupeou, which was created after the suppression of the old Parliament, by royal authority in 1770; and when the ancient body was recalled in 1774, the majority of the advocates, who had remained faithful to it, and refused to plead before its substitute, were so indignant at Gerbier as even to talk of his radiation from the roll. Afterwards he became involved in a bitter and prolonged quarrel with Linguet, an able but violent and unprincipled pleader who was expelled from the Bar in 1775. He died batonnier of the Order in 1788. Like Normand, he was sumptuous and extravagant in his personal habits; but he made immense sums by his profession. He is said to have received a fee of L.4000 from the Company of the Indies, and L.20,000 from a Sieur Cadet whose cause he had pled successfully.

Among the advocates of this period we may also mention Elie de Beaumont, admitted to the Parisian Bar in 1752, whose memoir on behalf of the widow of Calas—condemned and executed in conformity with the monstrous judgment of the Parliament of Toulouse—was read throughout Europe. He also distinguished himself by another memoir on behalf of Sirven, a Protestant of Saint-Alby, accused of having assassinated his daughter who wished to become a Roman Catholic. He and his family saved

themselves from a fate similar to that of the innocent and unhappy Calas, by a timely flight into Switzerland. But both he and his wife were found guilty and condemned to death. The memoir of de Beaumont places their innocence in the clearest light, and was successful in annulling the unjust sentence against them. Voltaire wrote him with reference to this memorial, "This is the second time, sir, that you have avenged nature and the law;" and afterwards he says, "What monsters you have had to combat! two parricides in two months inspired by fanaticism!"

By far the most distinguished French jurist of the eighteenth century was the famous Pothier, born at Orleans in 1699. He completed his legal studies in the university of that city, and was appointed councillor in the Presidial Court of Judicature at the age of twenty-one. In 1736, he commenced his great work upon the Pandects, which occupied him during twelve laborious years. In this immense task he had the assistance of his intimate friends, Prevot de la Janés, his colleague in the Presidial Court at Orleans and Professor of French Law, and of de Guienne, an advocate in the Parliament of Paris. On the death of the former in 1749, Pothier was appointed Professor of French Law in the University of Orleans, where his able and enthusiastic teaching speedily gave a remarkable impulse and development to the school of law, which, during the twenty-five years he presided over it, educated many of the first magistrates and advocates in France. Pothier lived a retired, quiet, and studious life. Besides his great work on the Pandects, he produced a number of other works of kindred excellence in various departments of the civil law. The principles, and even the expressions contained in some of these, have been transferred into the Code Napoleon. Pothier died at Orleans at the age of seventy-three.

THE LATE GEORGE BRODIE, ESQ., ADVOCATE.

Mr George Brodie, whose death we recorded last month, was a man whose services to legal and historical literature should not be passed over in silence. He was youngest son of William Brodie, Esq., of Chesterhill, in Roxburghshire, descended, we believe, from the Brodies of Brodie, and best known as an extensive farmer in East Lothian, to whom jointly with his friend Mr Dawson belongs

the merit of the introduction of turnip drill husbandry. His mother was a daughter of Adam Bogue, Esq., of Woodhall, co. Berwick. Mr Brodie was born about 1786, educated at the High School and University of Edinburgh, and called to the bar in 1811. He was from his boyhood a hard student, and early acquired a high position in general scholarship; but the theory and foundations of our law, and historical learning, particularly constitutional history, were the subjects to which he especially devoted himself. The work on which his reputation principally rests was first published in 1822 in four volumes, and is entitled, "A History of the British Empire, from the Accession of Charles I. to the Restoration, with an introduction, tracing the progress of society and of the Constitution, from the feudal times to the opening of the history, and including a particular examination of Mr Hume's statements relative to the character of the English Government." This work ranks among the most valuable existing contributions to the history of Great Britain, and may be said to have begun a new era in English historical literature. It is characterised by a diligence, accuracy, and perseverance which can hardly be overrated,—and the author shows a remarkable talent for deducing facts from scattered and apparently unconnected articles of circumstantial evidence. David Hume's pleasantly written narratives are unmercifully dealt with, and, traced to their original sources, are shewn in too many instances to be little better than romance. Though less known to superficial readers than the more popular works which have succeeded it, and are to a large extent founded on it, Mr Brodie's history is still esteemed by scholars, both in this country and on the continent, as the most learned and most satisfactory history of the period to which it relates.

Soon after the publication of his history, Mr Brodie was engaged in another literary labour. His "Commentaries and Supplement to Lord Stair's Institutions of the Law of Scotland," appeared in 1826, a contribution to the legal literature of Scotland which has been highly prized by all our most eminent lawyers. Not only do the Commentaries evince in every line abstruse legal learning, but it has been remarked by high authority that they are not like the work of a mere theorist, but of a lawyer in extensive practice. His care and industry in composing for the press were such that he revised the manuscript of his Supplement fourteen times before he was satisfied with it.

The struggle preceding the Reform Bill called Mr Brodie into active political life. He had not previously identified himself with the Whigs of the day: we understand that he was never seen at any of the annual gatherings known as the Fox dinners, presence at which came to be considered the crucial text of belonging to the party. But in 1830 he suddenly took up the position of what in later times would have been called an "advanced liberal;" and on the formation of the Edinburgh Political Union he was made its chairman, and presided at a rather famous meeting of that body in the King's Park. His disapproval of some violent resolutions proposed in committee led before long to his withdrawal from all connection with the Union, though requested by it to stand for Edinburgh; and in later life he was never prominent in the arena of politics. Though his political creed verged on Republicanism, it would be a mistake—one which no reader of his History could fall into—to suppose him a Democrat; nothing would have been more contrary to his views than the swamping of intelligence by mere numbers.

Mr Brodie was habitually unsparing in his condemnation of the neglect into which the study of civil law was falling, and in his censure of superficial lawyers whose acquaintance with their profession was confined to its practical side. While probably the most learned Scotch lawyer of his time, he never enjoyed a large practice at the bar. His private means were such as not to make the emoluments of his profession much of an object, and his talents were not of the kind that shine most in forensic displays. He was wanting in the tact and finesse which in the ordinary run of professional practice often supply the absence of higher qualities, a deficiency which the bulk of law agents did not consider atoned for by his superior learning, and the thoroughness which characterised all he did. The few cases in which he was engaged were almost always such as involved the discussion of some abstruse question going to the foundations of our law; such, for instance, as the *cause célèbre* of *Kerr v. Martin*, 6 Mar. 1840, where the whole Court by a majority of one decided that the rule of legitimation per subsequens matrimonium held good notwithstanding the intervening marriage of one of the parents. The amount of learning and precedent brought by him to bear on the case is probably without precedent in the annals of the Courts of Scotland. A characteristic story is told of his conduct of that case. In the debate before the Lord Ordinary (Cockburn) while the

opposite counsel—Duncan M'Neill—had prepared himself by a few notes of reference to such authorities as Erskine and Stair, Mr Brodie walked up to the bar followed by two clerks, each carrying about a dozen formidable-looking mediæval tomes. Lord Cockburn, whose forte was not the civil law, affected to listen attentively and take ample notes, when, at last, on Mr Brodie citing some German civilian with a jawbreaking name, his lordship interrupting him asked, "Which volume, Mr Brodie?" and the reply was, "I thought, my Lord, all the world knew that that illustrious author never wrote but one volume." No more judicial interruptions were attempted that day.

The only public appointment which Mr Brodie held was that of Historiographer Royal for Scotland, an honourable sinecure worth about £200, conferred on him by Lord Melbourne's Government in 1836, on the death of Dr John Gillies, the historian of Greece.

Occasionally in later life Mr Brodie took part in the discussion of some of the questions of Law Reform which engaged the attention of the Faculty of Advocates, more frequently however as a Conservative resisting rash changes than as an active innovator. We have a vivid recollection of his making a strong protest at a Faculty meeting against any modification of the Appellate Jurisdiction of the House of Lords, and defending his position, as usual, with a great deal of earnestness and historical learning. He embodied the views then expressed in a pamphlet published in 1856, which commented with much acuteness on the evidence given on the subject before the Committee of the House of Lords.

Mr Brodie was a man of marked idiosyncrasies, physical as well as mental. To the last he preserved an astonishingly fresh youthful appearance: and his erect gait, dignified carriage, fine classical profile, and keen eye, made him one of the most marked figures in the Outer House, where he was further conspicuous as one of the few advocates who wore the gown and hat, and never adopted the bar wig. In manner he had all the courtliness of the accomplished gentleman of the old school, an exterior which corresponded to a geniality and warmth of heart well known to his personal friends. Looking back a few years, we can hardly think of him apart from his twin brother Alexander, a man also of high scholarly attainments, long his constant companion, and almost his *alter ego*, whose death was a severe blow to Mr Brodie. In

1861 Mr Brodie removed from Edinburgh to London; and the last years of his life were spent in preparing for the press a second edition of his "History," which appeared in 1866. He died after a short illness on the 22nd of January last.

Mr Brodie was married to Miss Rachel Robertson, youngest daughter of Major David Robertson, first cousin of the most distinguished of his predecessors in the office of Historiographer, Principal Robertson, who survives him. He has left a family, including an only son in the diplomatic service, at present second Secretary of Embassy at Vienna.

SECLUSION OF JURIES IN CRIMINAL TRIALS.

The present practice of adjourning protracted criminal trials, and of secluding the jury, is a modern feature in our system. Baron Hume, who was not much inclined to abate the rigours of our former practice, considered the adjournment of a criminal trial as an indulgence, founded "on considerations of convenience rather than necessity," (vol. ii. p. 417.) Under our former practice protracted trials were certainly rare; but, in strong contrast to the dictum of the learned commentator, at least two cases are to be found before the date of his work, where adjournment did take place in circumstances of very apparent necessity. These cases, which are elsewhere referred to by Baron Hume, present dismal pictures of the protracted suffering to which jurymen were then subjected. The first is the famous case of the Lord Provost of Edinburgh, tried before the High Court in 1747 for neglect of duty in connection with the Rebellion of 1745. The jurymen, in that case, sat for upwards of *forty hours* continuously, a feat which modern jurymen would not be willing to emulate. The case being then not nearly finished, and there being no sign of an adjournment, the exhausted jurymen pleaded with great submission to the Court, that certain of their number were unable to "hold out any longer without some relief; that they could not imagine it to be the intention either of prosecutor or panel *to kill or destroy them;* which behoved to be the consequence should they insist upon finishing the trial at one sederunt." (State Trials, vol. 18.) The English practice of depriving jurymen of food, drink and fire, and coercing them into a verdict, has been sufficiently ridiculed; but this preposterous relic of barbarism—so fitly characterised by the historian Hallam—is equalled, if not surpassed by the deliberate starvation and torture of jurymen under our old practice. English jurymen obtained their liberty as soon as they

arrived at a so-called unanimous verdict; but the Scotch jurymen were not liberated until it was manifest that to detain them longer would be homicide. Nay, might it not logically be argued, from the procedure in the Lord Provost's case, that the killing of the jurymen was quite within the power of the panel, if his physical strength and endurance proved greater than theirs? For we find from the Record of Court that the adjournment so pathetically petitioned for, was not granted until the *consent of the panel* had been obtained thereto. Even after this consent the Lords seem to have doubted, as the record bears, that "they fully deliberated and argued thereon" before making the adjournment. The diet was continued till the following day; and, by interlocutor of Court each juror bound himself, his "heirs and successors," to appear at the adjourned diet under a penalty of £500. At the conclusion of the trial, the Court, in consideration of the arduous duties of the jurymen, agreed to exempt them from serving on criminal trials for five years.

In the subsequent case of Colonel M'Kenzie and others, tried for murder in 1803, an adjournment took place at two o'clock morning of the second day of the trial, after one of the jurymen had become unwell from long confinement. The adjournment was suggested by the Court, and was only made with consent of the panel. The jury in this case also became bound under a penalty of £500 to appear at the adjourned diet. This mode of securing the attendance of jurymen is now unknown, and seems to have been discontinued shortly after M'Kenzie's case, when the present practice came into operation.

Our English neighbours have still their preposterous relic, but we have happily forsaken our former barbarous practice. An adjournment of a protracted trial is now made at the end of a reasonable sederunt, when the wants of nature require to be satisfied. The practice is not regulated by any statutory provision; but has been established by Acts of Court founded on solid reasons of necessity. The jurors are ordered to repair to an inn, there to remain under charge of the macer and other officers of Court, till brought to their duty on the following morning. They are ordained to be strictly secluded, but the macer has access to them for the purpose of seeing to their proper accommodation; and the clerk of Court is allowed to have communication with them, if necessary, in regard to their pressing personal affairs. The officers and clerk are sworn faithfully to perform their duties. The usual form of adjournment will be found in the very protracted trial of the Glasgow cotton spinners in 1838 (2 Swinton 6). That trial extended over a week, the jury being conveyed each night to an inn. By a special interlocutor, pronounced on Saturday, the fourth day of the trial, the jurymen were allowed to be taken to church on Sunday, in charge of the macers; and they were also permitted on the Sunday to take an airing in conveyances in the neighbourhood of Edinburgh. These reasonable indulgences, including even the daily adjournments, were only granted with consent of the panels. Such consent, as a rule, has been for-

mally recorded in all such cases down to the present day; but it has come to be looked upon as a matter of course, and the interlocutor of adjournment is generally written out without his consent being asked. It would indeed be unreasonable to hold that the consent of the panel is essential to an obviously necessary act; and it is satisfactory to know that, in certain recent cases (not reported) before the High Court, adjournments (copies of which we have now before us) were made without the consent of the panels having been asked or recorded. The adjournments simply bore to proceed upon their true ground—the necessity of the case. This form of adjournment has not, as far as we are aware, been yet adopted in the Circuit Courts; but it is certainly desirable that it should become the rule in all criminal trials.

The reason for secluding the jury is to prevent them from being exposed to undue influence. It has not been considered necessary to adopt this precaution in civil trials, the condemnation or liberation of an accused person being of infinitely greater concern to the prisoner and the community than the amount of debt or damages to be recovered by a litigant. The seclusion of the jury in charge of an officer of Court also serves to ensure their attendance at the adjourned diet. Very serious consequences (unknown in civil trials) would result from the non-attendance of any of the jurymen at the adjourned diet. In criminal trials before the Sheriff and a jury the same course is followed, though such trials rarely extend beyond one day. We are aware of only one exception to this course in Sheriff Court practice. In a trial before the Sheriff and a jury at Edinburgh, in 1862, the jury, at the end of the first day's sederunt, were allowed to separate and return to their homes for the night. They duly appeared next morning, and the case was prosecuted to a conviction. In this case, the Procurator-fiscal and the panel and his counsel consented to the adjournment and separation of the jury, and this consent was minuted in the record, and signed. It is a nice question whether, if any undue influence had been brought to bear on the jury, to the prejudice of the prisoner, he could have objected to the proceedings after the adjournment. We confess, however, that we have no fear of any jury being solicited *against* the interests of the prisoner; our fear, founded on experience, lies the other way. The Procurator-Fiscal, in the Edinburgh case, by allowing the jury to separate, put himself in a far more unfavourable position than the prisoner. But, apart from the question of influence, there was a risk of another kind run, by allowing the jury to separate; for if one or more of the jurors, by some accident or unforeseen event, had failed to appear at the adjourned diet, we cannot see how a result fatal to the prosecution could have been avoided. On the whole, the exceptional course adopted in this case, if not wholly illegal, was at least of very questionable policy, and put the prosecution in serious peril.

In a recent trial, certain irregularities in this respect took place,

and were brought under the review of the Home Secretary. At the Dundee Circuit Court in September last, on the conclusion of the first day's trial of Peter Luke for theft and attempt at subornation of perjury, the case was adjourned till the following day, and the jurors were placed in charge of the macer and bar officer by the usual interlocutor of Court. Next day the jury appeared and the trial was resumed, and resulted in a unanimous verdict of guilty. The Advocate-Depute moved for sentence, and the case was continued till the following day in order that the Court might consider what sentence should be pronounced. At the calling of the case on the third day, the prisoner's counsel, Mr Guthrie Smith, moved an arrest of judgment, and maintained that the verdict was a nullity, on the ground that one of the jurymen had escaped from, or left the custody of the macer on the night of the adjournment, and had been absent till the following morning, when he took his place among his fellow-jurors before the trial was resumed. The Court declined to enter into the merits of the objection, on the ground that sentence having been moved the night before without objection, it came too late. They therefore repelled the panel's motion, and pronounced sentence of five years' penal servitude. A petition on behalf of the prisoner was thereafter transmitted to the Home Office, setting forth this and various other irregularities of minor importance on the part of the jury, and praying for the prisoner's liberation. The Home Secretary transmitted the petition to the authorities in Scotland for their report ; and it was ultimately refused.

The facts brought out in the report by the authorities have not been made public ; but in considering this case, the truth of the principal statement in the petition for the prisoner, viz., that the juryman was at large, may be assumed. We concur in the feeling of regret which has been very generally expressed that the Circuit judges did not either certify the objection to the High Court or dispose of it on broader grounds than those on which their judgment was vested. Either it was a good objection or it was not. If it was not a good objection they should have said so. If it was a good objection, then, it humbly appears to us to have been timeously taken. We assume, of course, that the statement of the prisoner's counsel is correct, that it was not taken sooner for the reason that he had no suspicion of the irregularity. If he had had notice of it before the verdict, he was then certainly barred from making his motion, for in that case he would have used it as a trap for the Court, which, if it had been made sooner, they might have avoided by discharging the jury, and commencing the trial *de novo*. But if he had no such notice, then he was quite entitled to move an arrest of judgment up to the very moment of sentence passing the judge's lips. The sentence had been moved for the night before, but in the Criminal Court there is no such thing as making avizandum ; and therefore we repeat, if the irregularity was a sufficient ground to vitiate the verdict which followed, it was unfair to deprive the prisoner of the benefit of it,

because he did not discover it till after the verdict had been returned. Perhaps, however, the summary disposal of the objection by the Court may be taken as an indication of their opinion on its merits.

No similar case has hitherto occurred in practice, although some old cases are to be found where verdicts were set aside on the ground of other irregularities by the jury. In the turbulent times of James VI. unscrupulous practices were resorted to by the prosecutors and their friends to obtain verdicts from the jury, especially in cases of treason. An Act of Parliament was accordingly passed to secure the jury from solicitation during their deliberations. The Act 1587, cap. 91, ordained that the jury should be enclosed as soon as the evidence in Court was laid before them, and that no person whatever should have access to them while considering their verdict; and in case any person unlawfully obtained access to them, the Act went to the irrational extent of declaring that the accused party was to be pronounced by the jury *innocent* of the crime charged against him. While the Act had the desired effect of preventing improper practices on the part of the prosecution, it was so illogically framed that it tended to encourage improprieties on the other side. Since the prisoner's innocence was to be declared, no matter who the person was who offended against the provisions of the Act, it presented to his friends an easy means of securing his acquittal. This is the only Act in our practice regulating the enclosure of jurymen. It is still substantially unrepealed, though, by modern legislation, it is not now necessary for the jury to enclose, if they can otherwise agree upon a verdict. Various cases are to be found in the books where the jury were guilty of irregularities under the Act, in failing to enclose, and holding converse with others, and the verdicts which followed were consequently set aside. A few years ago a similar result followed in a trial before a Sheriff and jury, where one of the jury left the court-house instead of enclosing with his fellow-jurors. Luke's case did not come within the scope of the Act, which only applies where the proceedings have been finished down to the period for the jury to deliberate. The irregularity of the juryman in Luke's case was not at a critical time when his presence was necessary in the deliberations of the jurors on the whole evidence. He was then in his place with his fellow-jurors; and his absence on the night of the adjournment was just what the Court permitted half a century ago, when they took the jury bound under a penalty to return next day. We do not defend the conduct of the juryman in Luke's case, but there seems to be no valid legal objection to a verdict returned after such an irregularity, though the irregularity itself might be treated as a contempt of Court. It would certainly have been a deplorable failure of justice had any other view succeeded. There was no allegation and no reason to suppose that the irregularity was prejudicial to the panel. It would be a most irrational conclusion that, on account of an irregularity, which does not affect the interests of the prisoner, a verdict

should be set aside and the prisoner liberated from the charge. Let the prisoner, by all means, have a fair trial, but let justice have fair play also. If the prisoner can show that he has suffered prejudice, or even if prejudice can reasonably be inferred from any irregularity on the part of the jory, let him have a remedy ; but that remedy ought to extend no further than a new trial on the merits before another jury.

The English practice in this respect is reasonable, and contrasts strongly with our own. In cases of felony the jurymen are secluded in a hotel under charge of officers ; though in cases of misdemeanour the practice for a long time has been to allow the jury to separate for the night. If a juryman separates from his fellows, and converses with another person concerning the trial, the verdict would be bad. But the prisoner would be put to his writ of error, and upon that being heard, the Court, if satisfied that the jury had improperly separated, would grant a *venire de novo*, and the prisoner would be tried again. This course was adopted lately, and the Court of King's Bench held the second conviction and sentence to be right. It has not been decided whether mere separation of jurymen, without conversation with others about the case, would affect the verdict, though it is considered that the leaning would be in favour of granting a new trial, as the juror might have been in communication with some one, although the prisoner could not prove it.

We might well imitate our English neighbours by placing our practice substantially on the same footing as theirs, so far as regards irregularities on the part of the jury in any stage of the trial. The Act of 1587 has long survived its use ; the practices which gave it birth having happily been long unknown. Its retention in the statute book is no longer necessary, and can only tend to its improper application to cases for which it was never intended.

W. B. D.

New Books.

A Practical Treatise on the Criminal Law of Scotland. By JOHN H. A. MACDONALD, Advocate. Edinburgh : Wm. Paterson.

A WORK on criminal law has been long wanted, and though many promises had been made by others, it has been left to Mr Macdonald to supply the want. Nor need the public regret that he has been allowed to anticipate other labourers, for he has produced exactly the kind of work most needed,—unpretentious, clear,

practical, and portable, yet bringing down the decisions to the last moment. His book does not aspire to be the rival or supplanter of Hume, who must always stand supreme as our authority; except in so far as direct legislation in the subject of crime, and judicial interpretation under Sir W. Rae's Act, have cleared our law of a quantity of technicalities and petty details. There were encumbrances and blots on a criminal system, which possesses an elasticity which is a terror to evil doers—inventors in the science of crime—and which has been a wonder to foreign lawyers, accustomed to the rigidity of codes or of Acts of Parliament equally unbending and less scientific. That elasticity has enabled us to solve the problem of reconciling the majesty and order of the law with perfect liberty to the subject.

It is forty years since Hume published his last edition; more than thirty since Alison gave the public his work, a work possessing merits and demerits equally remarkable. Often clear and suggestive, and as often obscure and misleading, it is a useful book but a dangerous guide. It is nearly a quarter of a century since Mr Bell produced his Notes on Hume, the only other contribution to our criminal jurisprudence which has appeared during the present century. It used to be a somewhat remarkable fact, that the class of cases with the conduct of which both counsel and agents were first trusted on being admitted to their profession, was that on which their education had been most limited, we had almost said entirely neglected; and indeed the latter statement was quite true so far as concerned those bodies who had to test their education, and latterly also as regards those institutions where it was received. This evil has now been at least partially remedied; but all the knowledge likely to be secured by examinations or taught in lectures, will not supersede the necessity of a ready book of reference available in the exigencies of a practice which almost excludes previous detailed preparation, and perils character and liberty on the quickness and resources of the moment. Such a book Mr Macdonald has supplied. It will be found a safe guide to the inexperienced, and a useful book of reference to all. It is an admirable condensation of the labours of the Justiciary Court for more than a quarter of a century. Condensation, indeed, is carried to the very last point, and the whole criminal reports seem exhausted in the notes. The index of matters is full and satisfactory, and so is the index of cases, to each of which is added not only the page where it will be found

quoted, but also the subject to which it relates,—a matter of no small moment for ready reference where so many crimes have been committed by people of the same name, and suggestive of curious speculations how far crimes run in districts or in families.

Though the book does not profess to be discursive, we think it perhaps errs in too faithfully enumerating decisions, and treating the law as conclusively settled by the last judgment—for instance, the author says when treating of Indictment (p. 340): "Even bad arrangement of the words, creating an ambiguity, may make the specification of the *locus* so uncertain as to cause the indictment to be held irrelevant. For example, when the *locus* was set forth as 'a field or park called Bannaty-mill Park, on the farm of Bannaty-mill, then and now or lately possessed by Geo. Swan, farmer, in the parish of Strathmiglo, and county of Fife,' the objection was sustained, that there was no specification of the position of the park, the words 'in the parish, &c.,' being so placed as to appear to be only the designation of Geo. Swan, and not to refer to the previous statement about the park."—(*John Buchanan*, Ap. 20, 1824, *Shaw*, 121.)

Now we hardly think that such an objection would be sustained now-a-days. Nor do we think it ought to be, though we have no sympathy with those on the public prosecutor's side of the Bar who think that any amount of looseness should be tolerated which operates merely against the prisoner. The interest of the public is not merely that the guilty should be convicted; it has an interest that no man, however guilty, be condemned by a process which, if turned against the innocent, might operate in justice. It has an interest, too, that its own officials, whom it pays for their work, should do it with precision and accuracy and distinctness, and that important and responsible offices be not conferred on those who do not bring these qualities to the discharge of their duties. If the public prosecutor charges a crime as committed at Bathgate in Fife, the failure of justice is not in the judge who does not allow proof of the offence in another county, but in the official who neglected his work. Even the lesser error of mistaking the parish, libelling Auchtermuchty instead of Collessie, we hold to be righteously visited on the officials, whose business it was to have ascertained precisely where the place was which they were describing. This subject, however, we recently dealt with in noticing Mr Dunbar's tract on the

"Escapes of Prisoners on Technical Grounds," and we need not now dwell upon it. Mr Macdonald in his Introduction, where he gives a general view of our system, and in his chapter on Indictment, is on the whole particularly fortunate both in his handling of the matter in hand and in his style, and has conferred a boon on all concerned in the administration of justice in our Criminal Courts. We excerpt his short terse observations on the subject of insanity as an illustration of his manner of treatment :—

"Insanity or idiocy is an absolute defence against a criminal charge. But there must be truly an alienation of reason, such as misleads the judgment, so that the person does not know 'the nature or the quality of the act' he is doing, or 'if he does know it, that he does not know he is doing what is wrong.' If there be truly this alienation of reason, as connected with the act committed, he is not liable to punishment, though on all other subjects his conduct may be rational. For example, if he put another to death, when truly under an insane delusion, as to the conduct and character of the person he kills, believing that the person is about to murder him, or is an evil spirit, or being under some similar delusion, then it matters not that he has a general notion of right and wrong. For in such a case of delusion, as Baron Hume expresses it, 'as well might he be utterly ignorant of the quality of murder.' He acts knowing murder to be wrong, but his delusion makes him believe he is acting in self-defence, or against a spirit. Nor does it alter the effect of the fact of insanity at the time of the act, that the party has afterwards recovered his reason. Instances have even occurred of one short and sudden access of maniacal phrenzy, in which an act is committed, and there is no recurrence of the mania. Such a case of insanity is obviously the most difficult to prove, but if proved, it is as effectual to protect from punishment as any other. But, on the other hand, the alienation of reason must be substantial. Mere oddness or eccentricity, however marked, or even weakness of mind, will not avail as a defence. And even monomania may be unavailing as a defence, where the delusion and the crime committed have no connection with one another, or where the party, though labouring under delusions, was yet aware that what he did was contrary to the law of the land. Disturbance to the mind is not enough, if the reason be not overthrown."

LORD COLONSAY.

SCOTLAND has sustained a loss which it would be difficult to overestimate in the resignation of Lord Justice General M'Neill, now raised to the peerage by the title of Lord Colonsay. No name known or more universally respected among his countrymen thus any laboured eulogium upon his character and services unnecessary, and would be premature and intrusive while

he still lives, and when there is a prospect that in another sphere he may yet for many years confer benefits upon his country that may in some degree compensate for the cessation of his labours as President of our Supreme Courts here. It would be improper, however, that this distinguished man should relinquish the seat he has so long and so worthily occupied without an attempt on the part of the conductors of this *Journal* to offer some sketch of a career which is, we believe, unequalled in the success which has attended it, and in the universality of the attainments by which that success has been achieved.

Lord Colonsay, the second son of Mr M'Neill of Colonsay, was born in 1794, and studied at the University of St. Andrews. Being destined for the legal profession, he removed to Edinburgh, and was for some years in the chambers of an eminent conveyancing house, where he acquired a thorough knowledge of that important branch of legal science, a knowledge which was afterwards of the greatest service to him in practice, and at a later period enabled him with safety and skill to originate and carry out those improvements in the structure of deeds and completion of titles, which contributed so much to simplify the forms, and facilitate the constitution and transmission, of landed rights.

He was admitted Advocate in the year 1816, a year which introduced into active life an unusual number of men afterwards distinguished by their talents and success, though not all of them in the profession they had chosen. Among twenty-one names in the list, we find, along with that of Duncan M'Neill, those of Erskine Douglas Sandford, John Shaw Stewart, Alex. Earle Monteith, William Menzies (afterwards Mr Justice Menzies), James Ivory (afterwards Lord Ivory), John Hope (afterwards Lord Justice-Clerk), John Gibson Lockhart (afterwards so eminent in literature), Robert Whigham, and Mungo Ponton Brown.

Without neglecting the civil department of practice, Mr M'Neil made himself early conspicuous by his careful study of criminal law, and by his appearances for the accused in the Court of Justiciary. In 1820 he was appointed an Advocate-Depute, and displayed, in the indictments which he framed, a clearness, precision, and conciseness, which made them models for imitation by all who came after him, and thus tended in a great degree to improve the style and structure of those important writs. It is no disparagement to any one to say that in a few years Mr M'Neill came to be acknowledged as the first criminal lawyer at

the bar, and we do not hesitate to affirm that for profound learning, acute analysis, and unerring accuracy, he never had an equal in that department in his own time. We believe that to his judgment and sagacity we mainly owe the excellent enactments of the statute of 9th Geo. 4th c. 29, passed when Sir Wm. Rae was Lord-Advocate, which effected a salutary revolution in criminal practice, and while it preserved in the essential parts the safeguards established by our Scottish system for the protection of the accused, made it all but impossible in future to defeat the ends of justice by merely formal objections unsupported by any substantial equity.

Mr M'Neill's success in the criminal department of the law was not confined to the technical, or strictly legal, part. He was a great forensic orator, in a style peculiarly his own, and as an advocate defending prisoners, displayed a combination of close reasoning, manly eloquence, and knowledge of human nature, which were not surpassed by the best efforts of Jeffrey and Cockburn. His speech for the defence in the trial of the Cotton-spinners is well known as a masterpiece of skill, energy, and pathos, and was pronounced by some, who were well entitled to judge, the finest piece of oratory that they had ever heard in a Court of law.

Mr M'Neill's progress as a pleader in civil causes, was equally successful, though not at first marked by the same outward display. For the first ten years of his professional life, the system of *writing* was still in force, and we believe that the amount of business thus accomplished by him soon came to be nearly as great as that of any other member of the bar. It was in this school of patient and laborious training that all our older lawyers were brought up, and we have a strong suspicion that the discontinuance of the system has not contributed to raise the attainments of the profession in some departments, and in particular in that familiarity with precedents and institutional authorities, and in that careful dissection, and accurate and guarded enunciation, of legal principles, which are forced upon the mind by the preparation of written arguments, admitting of a maturity of consideration, and involving a sense of responsibility such as can scarcely belong to an oral pleading. It certainly remains as yet to be seen whether any of the lawyers educated in the newer school shall equal, in solidity and depth of legal knowledge, the great men, such as Moncreiff, Jamieson, Rutherford, and M'Neill, who were produced under the former system.

In Civil Jury trials Mr M'Neill was able and successful, and in particular, in those involving questions of science or relating to the practical arts, his extensive and accurate acquaintance with those subjects, was of the greatest use to him, both as a counsel when at the bar, and as a judge when raised to the bench.

Mr. M'Neill was appointed Sheriff of Perthshire in 1824, and retained that office until 1834. It may not be uninteresting to say, that about this time some of his friends were apprehensive that from a modesty of nature and indisposition to come prominently forward, there was a risk of his not assuming that position as a leading counsel which he was so well entitled and so well fitted to hold, and that he might allow himself to be outstripped by others who had no higher claims, but who had more ambition or more self-assertion. But any risk of this kind was averted by the change which took place when Sir Robert Peel first came into power, and when Mr. M'Neill became Solicitor-General under that Government. This step involved the resignation of his sheriffship, and gave him thenceforward the position of a leader which he afterwards maintained, with what ability and success it is unnecessary for us to declare. His subsequent career is too recent to require that we should detail its successive steps. We may merely remind our readers that among other boons which the country owes to his parliamentary exertions, is the Poor-Law Amendment Act—a measure of the utmost importance to the social interests of the country, and which has been attended with a degree of success which it was scarcely possible to have anticipated.

In the course of the half-century that has elapsed since his admission as advocate, Mr. M'Neill, besides enjoying the widest reputation as a counsel in high practice, has passed through every possible grade of official promotion which the profession presents. An Advocate-Depute, the Sheriff of an important Court, Solicitor-General, Lord-Advocate, Dean of Faculty, an Ordinary Judge, and ultimately Lord-President and Justice-General, he is now honoured by his Sovereign with the first peerage that has been conferred on a Scottish lawyer since the union of the kingdoms; and in all of these successive advances he has had the sympathy, support, and cordial approbation of the profession and the country. No better review or description could be given of this successful course of life, than is embodied in the eloquent and cordial words spoken of him by the Dean of Faculty Moncreiff, in the address

lately presented to him on his retirement, and which we have inserted at length in another part of this number. We cordially concur in everything there said of his ability, industry, patience, and courtesy, and only venture to add that with all his habits of logical reasoning, and his reverence for legal principle, we never in his case saw "right, too rigid, harden into wrong," and that in all his judgments the invaluable element of *good sense* was ever predominant so as to preserve them from extreme views, mistaken applications, or dangerous consequences. We shall conclude without any further observations of our own, expressing our cordial wishes that Lord Colonsay may yet enjoy many years of health and happiness—a happiness that will not be diminished if his new position enables him still to render further services to that country which he has loved and served so well, and which will ever regard him as one of the best and most valued of her sons.

THE LORD PRESIDENT.

A Parliament House Ditty.

(Air, "There's nae luck about the house.")

And are you sure the news is true,
That's bruited through the town?
The Justice-General, they say,
Is giving up his gown.
Is this a time to joke and laugh,
And twirl the careless heel?
'Twill be another House, methinks,
When we have lost M'Neill!

Let Whig and Tory growl or grin,
At shuffling of the cards,
The counsels of the careless Gods
Transcend the thoughts of Bards;
One thought alone the Muse employs,
And clouds the brow with care,—
What will the Court of Session be,
When Duncan is not there?

More famous wits we may have had,
More skilled in various lore;

And now, alas! their names are few
On classic page that pore:
More bold expounders of the law
Might on the Bench be seen,
But in that chair, once filled by STAIR,
No better head hath been.

I saw him not in those great days
Of which the ancients talk,
When giants paced the floor, where now
They say that pigmies walk.
I saw not in its splendid prime
The glowing Celtic fire
Which, lighting up cold reason's track,
Even Saxons could admire.

I saw him only in the days
When in that highest place
He sat, a venerable form,
Which Time had touched to grace.
It seemed as if for him that seat
Had been alone ordained,
So easily, by native right
Of chieftainship, he reigned.

I saw him sit from day to day,
With high attentive mien;
Erect he bore his anxious charge,
Care-weighted, but serene:
No duty missed, no labour spurned,
Ne'er fribbled, nor forgot,
To do the work the country claimed
Was aye his ruling thought.

How calm and gracious would he sit,
When some would fret or snore;
A Highland gentleman too good
To snub the biggest bore;
'Twas only by the pensive look,
And heavy-laden eye,
We knew how mournfully he marked
The precious hours go by.

To his assessors on the Bench
Due deference did he pay,
Far from his nature was the pride
Of domineering sway;
To youth unskilled how kind in aid!
To weakest brethren bland;
Impatient only to the man
That vainly hid his hand.

Of eye unerring to discern
  Where difficulty lay,
But never forward to object,
  Or stop a speaker's way:
By nature prone to step aside
  Where dubious was the ground,
If erring, erring on the side
  Where safety might be found.

From mingled web of law and fact,
  Who has his equal seen,
To ravel out the threads of truth,
  And redd the tangled skein?
No pomp of logic cleared the path
  That led him to the light,
Where others toiled to prove, he saw,
  By gift of Second Sight.

A goodly sight it was to see
  The balance of his thought,
Now swaying this way and now that,
  As *pro* and *con* he brought,
And laid them in the well-poised scales,
  Till, as they equal seem,
The final grains of common sense
  And justice turn the beam.

No thought of shining ever moved
  His large and manly mind,
That with a noble negligence
  Threw showy arts behind;
Yet none in few and fitting words
  Choice thoughts could better clothe;
Loving the substance more than form,
  He won and mastered both.

Then fare thee well, Lord President!
  With honour, as with years,
Thou goest crowned, to take thy place
  Of right with Britain's Peers.
Our hearts attend thee from this House,
  And come what changes may,
We'll ne'er forget nor see the like
  Of Baron Colonsay!

From the Reporters' Box,
First Division,
February, 1867.

The Month.

The Resignation of Lord President M'Neill.—Lord Colonsay has ceased to be President of the Court of Session. The scene when he intimated his resignation in open Court was striking. The whole of the Bar of Scotland, headed by their Dean, had met to bid him farewell, and the speech of the Dean was worthy of the occasion. Anything more graceful or more polished could not have been delivered, or delivered in a better style. It is a perfect model for this kind of address, and we preserve it in another page for the service of future Deans of Faculty. With his baton of office before him, he gave forth his eulogistic words in language that did not violate good taste, and he represented the feelings of all his brethren.

The reply of the Lord President was also equal to the occasion. It was short, telling, and impressive; and the whole scene closed as such a scene should do, with dignity and decorum.

The time has not yet come to estimate the merits of the late Lord President. Of course in a theatrical scene like that which was enacted on Tuesday the 19th, there was no place for a criticism on the judicial career which has just closed. An old man of seventy-three has left us, to take his part in an uncongenial arena in which he must be a stranger, and where his very accent must be considered strange. Over the Court of Session he has presided for fifteen years, and during the whole of that time he has preserved to his Court the popularity which it acquired when it was at its zenith—when Boyle, Mackenzie, Fullerton, and Jeffrey were the judges. That was the most famous time of the First Division. There never was a Court which had so much of the confidence of the country as it had then; and the reason of it was, that it was quiet and patient, considerate and deliberate. Lord Colonsay profited by the example; and during his time the judges of the First Division of the Court have allowed parties to state their cases, and have heard them with patience; and nine-tenths of all the cases brought into Court have in consequence been marked for the First Division.

It is this faculty for silence which has made the fame of Lord President M'Neill. We lose him with regret. Although he has given forth no judgment exhibiting great learning, to which he never pretended, yet he was an able judge; he had an admirable

knowledge of human nature; and if he was not a great lawyer, he could analyze evidence well, and had an almost intuitive perception into human nature. He never shone so brightly as when he was dealing with evidence; and in almost every case of this kind, he reached the highest ambition of a judge, by sending both parties out of Court with the feeling that both of them had received justice.

The Legal Changes.—The retirement of the Lord Justice-General from the position which he has so long honourably filled excites but one feeling of regret, on account of the loss which the Parliament House in Edinburgh sustains, and of congratulation at the honour "tardily but well conferred" on Scotland. But the changes consequent on the removal of Lord Colonsay to another sphere of duty and labour, have very naturally been regarded by many, if not by most men with much less complacency. Perhaps the most general sentiment, apart from political and party considerations to which this *Journal* is altogether superior, is one of regret that the elevation of the Lord President to the peerage should have taken place at a time when the honourable and long-cherished ambition of the Dean of Faculty could not be gratified. It is certainly unfortunate that the system of party government should involve the necessity of occasionally passing over the men who have the best qualifications and the strongest claims to the highest judicial seats. Few, however, will grudge Mr Patton his good fortune in succeeding to an office the duties of which he will no doubt discharge with the ability, urbanity, and high sense of honour he has uniformly displayed throughout a long professional career. Lord Glencorse, as Lord President, will have the task of maintaining the popularity of the First Division. With colleagues so learned and laborious as Lord Curriehill, so shrewd and acute as Lord Deas, and so able and judicious as Lord Ardmillan, his lordship should have little difficulty in doing so. If he fails, it will certainly not be for want of eminent intellectual ability on his own part, nor of a rare combination of the most valuable judicial qualities in his colleagues. It is to be remembered, however, that there may be different ways of accounting for the favour with which the public regards the one division or the other. In the days of Lord President Hope the First Division was not so generally preferred by litigants as it has been during the last generation; and upon one occasion, we have heard, his lordship asked his private clerk,

Mr James Waddell, how it happened that so many causes went to the other side of the Court. "Well, my lord," replied Mr Waddell, "a great deal depends upon having popular clerks (*i.e.*, principal clerks.) If your lordship could just bring over the clerks from the Second Division, maybe the cases would come too." We fear that this statement was founded rather on an amiable desire to be polite than on an accurate induction from the facts. The most satisfactory state of things in the Court of Session would certainly be that in which equal confidence is bestowed on each Court; and we trust, therefore, that Lord President Inglis will not be called upon during his tenure of office to transfer causes either from or to his own Division.

The appointment of the new law officers of the Crown seems to have been attended with serious difficulty. It was at first assumed that Mr Gordon would become Lord Advocate, and be succeeded, as Solicitor-General, by Mr Millar, the counsel whose standing and practice seemed to bring him nearest to the coveted distinction. Mr Dundas, the Vice-Dean of Faculty, was also thought entitled to the office, but that he was unwilling to exchange the comparative quiet of his Sheriffdom and large consulting practice for the turmoil and anxieties of public business. The Parliament House was rather surprised by whispers and surmises (not, we suspect, without *some* foundation in fact), that it was proposed to bring into office a gentleman who had taken leave of the profession some years ago, when he resigned the Chair of Civil Law; and the surprise became amazement when it was said, not merely that that gentleman was willing to take office only as Lord Advocate, but that Mr Gordon did not refuse to remain in the second place. This preposterous proposal has, however, for a few days, been no more heard of. Mr Gordon, it is understood, will undoubtedly be Lord Advocate, but, when we write, the Solicitor-Generalship is still undisposed of. Besides Mr Millar, whose appointment seems to be certain, other claims, it is said, have been made in connection with this office, only showing the difficulty which the present administration has in filling it up.

The Lord Justice-General's retirement from the Court of Session.—On the afternoon of Tuesday Feb. 19, in the Court Room of the First Division of the Court of Session, addresses were presented by the Faculty of Advocates, the Society of Writers to the Signet, and the Solicitors before the Supreme Courts, to the Right Honourable Duncan M'Neill, Lord Justice-General, on the

occasion of his retirement from office, and his elevation to the Peerage. The Court was densely crowded, a large number of ladies being present. Shortly before two o'clock, the Dean of Faculty, holding in his hand his baton of office, entered the Court, amidst loud applause, and took his seat at the bar. Sir William Gibson Craig, Principal Keeper of the Signet, accompanied by Mr Hope the Deputy-Keeper of the Signet, and Mr John Gibson, junr., the Treasurer of the Society of Writers to the Signet, took up places within the bar, as did also Thomas Landale, Esq., Preses, J. Carment, Esq., Vice-Preses, and Thomas Leburn, Esq., Treasurer of the Solicitors before the Supreme Court. Shortly after two o'clock the Lord President entered the Court, accompanied by all the Judges, except Lord Deas, who was absent on account of indisposition.

The DEAN of FACULTY (James Moncreiff, M.P.), said—My Lord Justice-General, the Faculty of Advocates having been informed that you are about to relinquish the seat at the head of this Court which you have so long and so worthily filled, at a meeting held this morning resolved to address your Lordship upon the occasion; and preferring, to entering their views upon their minutes, or the colder or more formal words of a written document, a few spoken sentences by myself, in their name and my own I have requested, and gladly avail myself of, this opportunity of expressing our sentiments. The severance of long-continued ties, and the achievement of high honours, can never, when they relate to one whose name is inscribed upon our roll, be a matter of indifference to the Faculty; but on this occasion the tie has been so close and so long-continued, and the honours are so eminent and unusual, that no one will be surprised that we should eagerly have embraced the present occasion to speak our words of farewell. This we regard as the culmination more than the termination of a career of singular and unvarying success—success commanded by exertion of that stamp which fortune does not precede, but follows. When we look back upon that career, we are proud to remember, that after having discharged with distinction the functions of every public office which is open to the ambition of our profession, and having reaped the still more gratifying fruits of a foremost place in its active exercise—having been chosen as the head of the Bar by the free voices of its members—chosen as the first law officer by the confidence of the Crown—after a Parliamentary career of great distinction, leaving behind it, impressed upon the statute-book, its memorial in the shape of wise and enduring legislation,—your Lordship was selected nearly fifteen years ago to preside in this the Supreme Court of Scotland. How the duties so imposed upon your Lordship have been performed, it is not for me, it would be unbecoming in me,—it is needless for me in this presence, to inquire. The confidence which prompted that choice was ratified by the profession and the public, and it has continued in unabated and in increasing measure ever since,—a confidence not confined to that profession who are the daily observers of the discharge of judicial duties, but extending to the suitors who sought for justice within these halls, and the great body of

the public outside throughout the land. Never, I believe, in the history of this Court, has more lustre been shed upon the exposition, or more dignity imparted to the administration of the law, than under the presidency of your Lordship. Its memorial is engraved on the jurisprudence of Scotland. Nor should I omit, as one strong claim upon the gratitude of the public and the profession, the less ambitious and obvious, but not less useful labours on which, in truth, the whole judicial fabric rests,—I mean the unwearied and sedulous devotion, the conscientious labour, which your Lordship has bestowed upon those details incident to the position which you occupy, and the discharge of which has added strength and stability to the institution of which you are the head. One other matter I cannot omit. In the name of the Faculty, collectively and individually, we thank you most heartily and sincerely for the unfailing courtesy, the kindly judicial demeanour, the forbearance and consideration, the generous aid which we have met with at your Lordship's hands, which has lightened the discharge of responsible labour, and has been extended alike to all—to the youngest as to the oldest—to the humblest as to the foremost of our profession. These things we are gratified to think of. We remember them with pride, we part with them with respectful regret. But I cannot omit, in the name of the Faculty, to say that they have heard with great gratification that it is the pleasure, the probable pleasure, of Her Majesty to bestow still higher rewards in token of your Lordship's long services, and that there is a prospect of your being elevated to a seat in the Upper House of Parliament. We have heard that with great gratification. If it were only a reward of services long, meritoriously, and ably discharged, we should think the Bar of Scotland honoured in your Lordship's person, and look upon it as a gratification and embellishment to our order. But, we also know, it has been said that not only the effect but one of the objects of conferring this high distinction is, that the public may have the benefit of your Lordship's services in the Court of last resort; and in that light, if what is rumoured be true, it is a matter of importance even far beyond the limits of the body for whom I speak. It is, as we regard it, the recognition of a debt due to Scotland, tardily but well conferred. We are conscious of the many benefits which Scotland has obtained from the appellate jurisdiction; but we cannot but rejoice that in your Lordship's addition to their number they will not only gain an addition to the qualities which have been found there, but that your Lordship will contribute that scientific knowledge which long training only can bestow, and that acquaintance with systematic detail which is only to be acquired by the active and habitual exercise of the profession; and if your Lordship's career in that elevated scene be as useful to the public as your presidency in that chair has been, you will confer upon the country which we love, and the system of jurisprudence of which we are justly proud, fresh and increased obligations. In the name of the Faculty, we bid you farewell. With these sentiments in our hearts, our hope is that you may long enjoy and adorn the distinctions which your public services have so eminently and honourably earned. (Loud and prolonged applause.)

The Lord President, in reply, said—Mr Dean, and gentlemen of the Faculty, I thank you,—sincerely thank you, for this manifestation of kindly feeling towards me. More than fifty years have elapsed since I joined the ranks of the Faculty, at a time when some of those great men whose names we still revere—and one of which you, sir, bear—were in the zenith of their

power and fame; and I well remember the admiration with which I then regarded them, and the pride I felt in belonging to a body which could boast of such members; but I also remember with gratitude the forbearance which those men showed so kindly when I happened to be brought into unequal conflict with them, and the kind encouragement which I received from them when I happened to be enlisted under their leadership. The lapse of half a century has necessarily wrought great changes in the ranks of the Faculty, but it is most gratifying to receive this assurance that it has wrought no change in those kind feelings which, during the whole period of my forensic career, I experienced from my brethren. I trust you will believe me when I say that the respect for the Faculty, the jealous regard for its honour and reputation with which I was imbued at the commencement of my professional life, has not abated with the approach of what I may now call its close. In the course of a long life it has been my good fortune to have been, as you have observed, the recipient of not a few marks of professional and official distinction; but I can truly say that not one of them gave me more heartfelt gratification at the time, or has been more fondly cherished in my memory, than the distinction conferred upon me by my brethren at the Bar, when by their united voice I was placed in the chair which you, sir, now so worthily fill. You have been pleased to allude to the manner in which my official duties have been discharged, and you have done so in terms which I might regard as the language of flattery, were it not that they come as the public expression of its opinion from a body so independent as the Faculty of Advocates, who have the best opportunity of daily observation, and who are unquestionably the best judges on such matters. It is a most gratifying tribute, and relieves my mind from that load of anxiety under which I entered on the duties of this chair, and permits me to vacate it with feelings of a very different kind. But it is obvious that the duties of the Bench could not be satisfactorily performed without the great advantage which we derive in our deliberations from the ability and learning of the Bar. It is not without a pang that I now cease to frequent these halls which I have so long frequented,—that I relinquish the pleasure of meeting here daily, and of seeing those faces and hearing those voices with which I have been so long familiar, and that I give up the satisfaction of observing the display of ability and learning and skill of the practised members of the Bar, and the great delight of witnessing the gradual development of rising talent. But responsible and onerous duties,—constant and continuous,—weigh heavily upon a mind of constitutional anxiety. The progress and influence of time is irresistible. I deem it wiser to accept the first hints of that relentless invader than recklessly to set them at defiance. I therefore feel that it is more becoming and better that I should incur the risk of the remark that I have quitted too soon than that I should expose myself to the reflection that I have delayed too long. You have been pleased to refer to another circumstance, which, if it be the gracious pleasure of Her Majesty to realise, we can only regard as one more of the many proofs that she has been pleased to give of her constant eye upon this part of her dominions, and her disposition to allow the ancient institutions of this part of her kingdom to participate in those honours of which she is the fountain. If I am placed in a position to discharge duties such as I have been in use to do, I shall endeavour to the best of my ability to perform that task. I am now about—and it is with deep emotion that I an-

nounce it—to part from colleagues with whom I have been acting in constant harmony, and from whom I have received the most cordial support and the most able assistance. I can never forget the benefits which I have derived from that assistance, and I can never cease to have for them the most cordial affection and regard stamped on the tablets of my memory. I hope you will accept these expressions of my feelings in regard to the Faculty, and that my colleagues will believe the sincerity of the remarks which I have made. They have known me too well to believe that I would speak anything but what I feel. (Applause.)

The Principal Keeper of the Signet, on behalf of the Society of Writers to the Signet, then presented an address to his Lordship.

Mr Landale, Preses of the Society of Solicitors before the Supreme Courts, then read an address, which so aptly touches on some of the characteristics of the ex-Lord President that we cannot refrain from quoting it:—

To the Right Honourable Duncan M'Neill,
Lord Justice-General of Scotland.

My Lord,—We, the Society of Solicitors before the Supreme Courts of Scotland, take leave to address to you a few words expressive of our feelings on the occasion of your relinquishing your position as head of those Courts, to take your place in the Upper House of Parliament, in obedience to the call of Her Majesty.

At a very early period of life you won the confidence of suitors by the soundness of your opinions, by your eloquence and skill as a pleader, and by the respect habitually paid by the Bench alike to your talents and your probity. The manner in which you filled the successive offices of a local Judge, of Dean of Faculty, of Solicitor-General, and afterwards of Lord Advocate, with a seat in the Commons House of Parliament, commanded just admiration; and your subsequent elevation to the Presidency of the College of Justice met with the unanimous approval of the profession and the country.

We do not presume to dwell upon the mode in which you have discharged the duties of your high position. The printed records of your judgments will tell posterity of a Judge whose vast legal stores co-operated with the instincts of humanity, and who knew so well how to reconcile the claims of law and of justice. Those records, however, will tell but imperfectly what we, in common with the other members of the College of Justice, know of a bearing, ever dignified, but kindly alike towards Judges and practitioners—of a temper ever equal—of an unwearied anxiety to reach the truth—of great firmness, and of great gentleness—in a word, of a judicial character which has equally won our confidence, our respect, and our love.

We do not affect to disguise it, that our concern is great at seeing you removed from the headship of the Courts before which we practise, but our regrets are modified by the pride we feel in seeing the merits of our chief thus recognised by his Sovereign, and that you are hereafter to occupy a higher and more important sphere of usefulness to your country. As you go from among us, our best wishes attend you, and our trust that many days of health, strength, and usefulness may yet be yours.

The LORD JUSTICE-GENERAL, in reply, thanked the Society of Solicitors, and added—To have received on an occasion such as this the expression of approval of all the bodies engaged in the conduct of business in the Court is, I think, the greatest reward that a person retiring from the position I now occupy could possibly receive. If the event which you have referred to, rather by anticipation, ever should be realised, I hope I shall be able to carry to the performance of my duties elsewhere the same claim to your respect which you say I have acquired here.

The Court then rose; and as he was leaving the chair,

The LORD JUSTICE-GENERAL said—I must now say to you all farewell in my judicial capacity. (Loud applause.)

Compensation for Railway Injuries.—A communication on this subject from Professor Syme appeared in the *Lancet* some time ago, which deserves attention not only on account of the eminence of its author, but also for the importance of the subject to which it relates. It gives a curious private history of a case which was tried at the last Christmas Jury Sittings in Edinburgh. Professor Syme referred also to the case of Denham v. Great Northern Railway Company, tried at Guildhall a year earlier, in which the plaintiff, a commercial traveller, asked for £12,000, and got £4700. That case was remarkable for the conflict of medical evidence; and, as Mr Syme asserted, for the fact that "before the end of many months, the plaintiff, who had been rapidly recovering, admitted that he was quite well, as he still continues to be." This, it is right to mention, has called forth a letter from Mr Denham's law agent, containing a denial of the statement. There also appeared in a subsequent number of the *Lancet* a letter from one of the medical gentlemen who had given evidence on the opposite side from Mr Syme. This, as was to be expected where two medical gentlemen differ in opinion, is in a highly controversial tone, but it contains nothing to our present purpose. As Mr Syme's paper has not, so far as we are aware, been noticed in Scotland, we quote the material parts of it. After the reference to Denham's case:—

> The truth is, that when juries find the medical evidence so conflicting, not being able to judge for themselves as to the merits of the case, they almost always decide in favour of the claimant, so that there is thus great encouragement afforded to unfounded or exaggerated demands for redress. Indeed any man who travels by railway may easily obtain a competency by stumbling on the platform after the door of his carriage has been opened by a servant of the company, but before the train has ceased to move. He has then merely to go to bed, call in a couple of sympathizing doctors, diligently peruse Mr Erichsen's lately published work on Railway Injuries, go into court on crutches, and give a doleful account of the distress experienced by his wife and children through his personal sufferings, which have resulted

from the culpable negligence that allowed him to leave his seat prematurely. Who can doubt that in such circumstances the jury would give large damages.

This system ought certainly to be put down, and as one means of doing so, I beg to suggest the publication of cases exhibiting an entire discrepancy between the medical evidence, in order that regard for professional character may tend to check the reckless advocacy of one-sided views. The results of such cases in regard to the claimant's speedy recovery of health would also be worthy of attention for the same purpose; and, having given one of these, I may add a case of medical diversity that has just occurred here.

On the 27th of April last a commercial traveller drove out in the evening to my residence in the neighbourhood of Edinburgh, and informed me that he had been shaken the night before in a railway collision near Berwick-on-Tweed. He had walked immediately afterwards a mile and a half to see Dr. Maclagan, of Berwick, and having been assured by him that there was no local injury or occasion for confinement, had come on to Edinburgh. Finding that there was no local complaint, I desired him to call next morning at my house in Rutland Street, and tell me if he felt anything wrong. He accordingly did so, and then exhibiting the most perfect freedom in all his movements, without any sign of local injury, I concluded that if he felt any uneasiness, it must be more mental than bodily. Having expressed my opinion to this effect, I was rather surprised by being asked to recommend a law-agent, and, it is hardly necessary to say, declined to do so.

On the *same day*, the 28th of April, it appears that this person, having procured an accomplished agent, applied to a surgeon of experience in cases like his own, who discovered that he had sustained a "severe wrench of the spine and sacro-iliac synchondrosis," put him to bed, called in a trustworthy coadjutor, and visited his interesting patient at least once a day for months. On the 12th of June Dr. Dunsmure requested me to see the claimant, as he had now become. We found him lying upon a sofa, from which he rose and walked with vigour and flexibility of body. There was not the slightest swelling, discolouration, or rigidity of the spine, and, on the contrary, every appearance of good health so far as we could judge from our own observation.

On the 29th of July, the trial being about to take place, the claimant desired to be examined by a commission; and his ordinary attendant having given a certificate on "soul and conscience" that he was unable to appear in the witness-box without serious injury to his health, I was requested along with Dr. Dunsmure to report as to this for the information of the Court. We found the claimant lying, or rather lolling, on two chairs in a garden, to and from which he walked in leaving and returning to his room, which was up a stair on the drawing-room floor. He told us that he sat at his meals, and, on the whole, he had no appearance whatever of bad health. We reported our opinion that he could safely appear in Court, and the trial was ordered to proceed. But the claimant's legal advisers applied for delay.

On the 14th of December Dr. Dunsmure and I were again requested to see the claimant, as the trial was to take place on the 24th. We found that he was not at home, but after a little while saw him walking stoutly

along the street from a public bathing establishment, which it appeared he had frequented for several months. He walked up the stair of his residence before me, and neither then nor afterwards, when more particularly examined, showed any sign of spinal or other disease. At the trial, after the plaintiff had been examined, sitting in a chair, as he was not able to go into the witness-box! his counsel agreed to accept L.1000, instead of the L.3000 which had been demanded.

I deem it unnecessary to offer any observations on this case, but would suggest the following questions:—

1. Could any one who had sustained a severe wrench of the spine and sacro-iliac synchondrosis immediately afterwards walk a mile and a half, or on the two following days travel sixty miles by railway, drive about in cabs, and make visits without local complaint?

2. Could serious disease of the spine resulting from external violence exist for eight months without presenting some sign of its presence in the patient's gait, flexibility of trunk, or general appearance?

Edinburgh, Dec. 26, 1866.

Scotch Bills in Parliament.—The Hypothec Amendment and the Recovery of Debts in Sheriff Courts Bills have been introduced and read a first time in the House of Lords. It is also said that another Hypothec Bill is likely to be introduced. The Government Bill is a mere transcript of the recommendations of the Hypothec Commission. The rival bill, we presume, is that which was prepared, but not introduced last Session, by Mr Young, M.P., and which (as may be conjectured from the statement of his views given on another page) proposes to abolish the landlord's preference altogether. Mr Walpole has announced, in the House of Commons, that several other Bills are in an advanced state of preparation—viz., the Writs Registration Bill, the Justiciary Court Bill, the Heritable Securities Succession Bill, and the Consolidation of Law of Nuisance, &c., in Scotland Bill.

In the House of Commons, on the 21st of February, on the motion of Sir Graham Montgomery, a Bill was brought in and read a first time, to regulate the Office and Court of the Lyon-King-of-Arms in Scotland. Its provisions include the substitution of salaries for the fees hitherto payable to the officers of the Lyon Court, and the eventual reduction of the number of Heralds and Pursuivants to three of each. The rights of the present Lyon Clerk and the present Heralds and Pursuivants are reserved.

Mr Young, M.P., on proposed Law Reforms.—The Whig ex-Solicitor-General has been addressing his constituents in the Wigtown Burghs. Leaving for a time the all-engrossing topic of reform of the franchise, he adverted to some subjects with which he may be supposed to be more familiar, and as to which the

opinions of the acknowledged leader—*facile princeps*—of the Scotch bar are perhaps entitled to be recorded in our pages :—

THE LAW OF HYPOTHEC.

As one of the Commissioners I considered the subject with all anxiety, and the view I took of it was this—that a landlord ought to have no greater security for the debt which his tenant owes him than other members of the community have for debts incurred to them in the ordinary course of business. It did not seem to us that people whose trade consists in letting land for hire—which is precisely the position of landlords—are entitled to any greater protection than other members of the community. This explanation has been offered—that landlords must of necessity give credit; they can't have their rents before the crop is reaped, and as they must give credit, they ought therefore to have security. I do not see the consequence. Other traders must give credit, or all business would stop. Why should landlords who give credit from the necessity of the case give that credit at the risk of other people? It is the greatest mistake in the world to say that the produce of the farm is the landlord's. No doubt it is the produce of the farm, but it is the produce of manures, of various artificial and natural appliances, of the tenant's skill and labour, of the labour of those employed by him—in short, of the expenditure of his capital, skill, and industry. The crop is the produce of all that, and why is the landlord to have a preference as to that over all others? Why is his tenant to be put in the invidious position that he cannot go into a bank in order to obtain accommodation on the same footing as others, and that all the banks should have it proclaimed to them that all that man's stock-in-trade and all the produce of his farm are hypothecated to one favoured creditor, who, if any calamity befalls him, can step in and carry off stock and produce to the prejudice of every other trader? That is hurtful to the tenant, but it is absolutely unjust to the trader; for I have never been able to see why those who furnish tenants with the materials necessary for carrying on the business of the farm should find their claims postponed to those of the landlord. It is the greatest delusion in the world to represent—as is sometimes done by reference to ancient Scottish law—that the produce of the farm is the landlord's, and that he is entitled to a certain share of it. It used to be the system under that old Scotch law—which speaks of tenants "as the puir bodies that labours the grund"—it used to be the system that the "puir bodies" raised the crops and gave the landlord a share of them, or rather received from the landlord a share of them for their own remuneration. But it is absurd to say that a landlord has any more property in the produce of a farm that he lets to another man than he who lets a manufactory to a tenant has in the produce of that manufactory. It is said—if you deprive the landlord of the security of the hypothec—that is to say, of the security which he holds at the expense of others—you will injure a very worthy class of the agricultural community—namely, the small farmers—who are altogether or nearly destitute of capital, but who are honest, industrious men, who make their rents out of their farms, very much by the labour of themselves and their families; and that, without the security of the hypothec, landlords would not take them as tenants, and thus a great hardship would be inflicted upon them. I have not the remotest apprehension of such a result. The result of the inquiries we made on the subject was, that there were no safer tenants than this very class, that there were no tenants in Scotland who paid their rents more punctually than they, and that landlords felt with these men the greatest security. In the first place, therefore, landlords are not exposed to any extra danger of loss from dealing with these smaller tenants; and if they are exposed to any loss, it may be asked, why do they let their farms to them? The answer is clear. They get higher rents from these tenants of small possessions than from the greater tenants with capital for their farms. It is for their own profit, therefore, that they select this class of tenants. I would not for the world cast any suspicion on the motives of landlords, but if they let their farms for perfectly adequate rents to well-selected tenants of small capital, and if they run a risk in so doing, that risk should come upon themselves; and I certainly would not give them much credit for kindness in letting their land to a class of small tenants if that kindness is to be at the risk and expense of other people. Mr Young went on to say that he had seen the draft of a bill on the subject, which was confined in the meantime to carrying out the minor changes on which the Commission was agreed, and which would be introduced this session, but which he had no expectation of seeing passed by the present Parliament until the Reform question was settled. He would

not willingly endanger these changes, for they would effect improvements; but if without doing that he could see his way to secure the passing of a larger and more extensive measure he would not fail to the best of his ability to endeavour to attain that end.

THE GAME-LAWS

Was a subject which it was extremely difficult to deal with by legislative enactment. He had been gratified to perceive that the tenant-farmers in several districts of Scotland had been bestirring themselves upon the subject, and to some effect. It was from public opinion alone that any change would be effected. It was not a matter in which Parliament could interfere with much practical effect. There might be an Act making the presumption, in the absence of a contract, either one way or another; but, so far as he was able to see, legislation could do no more than this, for it would be contrary to that principle of freedom as to which they were all agreed, upon which, at least, all the members of the Liberal party were agreed, that Parliament should interfere to prescribe the terms upon which private contracts should be made. In Aberdeenshire, Kincardineshire, and other counties, the farmers had shown how strong they were; and if the farmers in this district would follow that example by showing how earnest they were on the subject, they might depend on it that public opinion would run strongly in their favour, and that the grievance would not be of long continuance.

THE LORD ADVOCATE'S SMALL-DEBT BILL.

It is proposed to extend the small debt jurisdiction of Sheriffs from L.12 to L.50. Debts under L.12 are at present called small debts, and it is proposed that debts up to L.50 shall in future be called small debts, and that Sheriffs and their substitutes shall have power to deal with such cases in a summary manner—to be, in fact, supreme—no review being allowed except in a certain manner specified in certain exceptional cases. It does not, I confess, appear to me that you will ever make a L.50 debt a small debt by calling it so. L.50 seems to me to be a considerable sum of money. And I don't think you will make a debt of this kind more easily dealt with by the Sheriffs and Sheriff-Substitutes in Scotland by calling it a small debt. No doubt it is very much to be desired that men should be able to have their disputes—and there are many honest disputes among men—settled speedily and cheaply. But I fear this involves a problem which remains to be solved, not only in this country, but in England and every country I know; for cheap law has not yet been found to be very beneficial. I am not altogether sure—though, perhaps, it is a strong thing to say—that it is quite desirable, for my experience is, and probably it may be the experience of most of you, that cheap law is like other cheap things, very apt to be of bad quality. You may have more of it for your money; a great many more litigations—cheap litigations and cheap law, but I rather think that it would be better to have little of it and of good quality, even although it should cost rather more. I am afraid that litigation may be increased, not to the benefit but to the prejudice of the community. For my own part, I am not for extending the final jurisdiction of the Sheriff in this respect beyond the mark at which it has stood for now upwards of a quarter of a century. A grateful country ought to erect a monument to the man who should solve the problem—for the solution of which we have been so long waiting—of providing good, cheap, and at the same time speedy law, but I do not think you advance a step towards the solution of it by enacting that Sheriffs and their substitute shall be summary and supreme in all cases up to L.50.

Appointments—Scotland.—Alexander Forbes Irvine, Esq., of Drum, Advocate, has been appointed to the office of Clerk of Justiciary, vacant by the resignation of Mr Charles Neaves. Mr Irvine was admitted to the Faculty of Advocates in 1843, and, as he has reported the decisions of the Court of Justiciary since 1851, may be presumed to have a certain claim to the preferment he has obtained. He is Convener of the County of Aberdeen, and, in that capacity, has acquired a reputation for business talents

which augurs well for the successful discharge of the important functions to which he is now called. The salary is £700 a year. We learn, with satisfaction, that Mr Donald Robertson, so long known as the able and experienced clerk to the ex-Lord Justice-General, has been appointed to the office of Depute-Clerk of Session, vacant by the resignation of W. F. Skene, Esquire, W.S.

APPOINTMENT—England—Lord Derby, not content with the legal patronage which fortune has bestowed on him, has created a new legal office, that of Legal Adviser to the Colonial Office, with a salary of L.1200 a-year. Mr Henry Thurstan Holland, Barrister of the Northern Circuit, has received this appointment, which is to be incompatible with practice at the Bar.

ROYAL COMMISSION.—The Queen appointed Sir William Erle (late Lord Chief-Justice of the Common Pleas), the Earl of Lichfield, Lord Elcho, Sir Edmund Walker Head, K.C.B, Sir Daniel Gooch, Herman Merivale, Esq., C.B., James Booth, Esq., C.B., John Arthur Roebuck, Esq., Q.C., M.P, Thomas Hughes, Esq., barrister-at-law, M.P., Frederic Harrison, Esq., barrister-at-law, and William Matthews, Esq., to be Her Majesty's Commissioners to inquire into and report on the organization and rules of trades' unions and other associations, whether of workmen or employers, and to inquire into and report on the effect produced by such trades' unions and associations on the workmen and employers respectively, and on the relations between workmen and employers, and on the trade and industry of the country, with power to investigate any recent acts of intimidation, outrage, or wrong alleged to have been promoted, encouraged, or connived at by such trades' unions or other associations, and also to suggest any improvements to be made in the law with respect to the matters aforesaid, or with respect to the relations between workmen and their employers for the mutual benefit of both parties. Mr F. P. Onslow has been appointed Secretary to the Commission.

NOTE.

We regret to find that the reference to Mr John M'Laren in the letter of "An Advocate" on Colonial Appointments in our last number, has been misunderstood. We do not think, that such an allusion in this *Journal*, with which Mr M'Laren was so long honourably connected, can fairly be construed in the disparaging sense which we understand has been put upon it in some quarters. To any one who has even a slight acquaintance with the recent history of Edinburgh and the Parliament House, nothing could seem more pertinent, in treating of the exercise of Government patronage in Scotland by the Whigs, than to refer to a well-known transaction from which Mr M'Laren at least derived no discredit. Our correspondent assures us, further, that he has the highest respect for Mr M'Laren, and that in alluding to him he had no intention to convey any different impression.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

SHEPHERD & Co. *v.* BARTHOLOMEW & Co.—*Jan.* 23.

Proof—Bill.

Shepherd & Co., Manchester, sued Bartholomew & Co., Glasgow, for £4085, "being the price of cotton bought by the defenders from the pursuers, and for which two bills were drawn by the pursuers upon, and accepted by, the defenders," dated respectively 22nd Dec. 1864 and 2nd Jan. 1865. The pursuers set forth that they had for some years past had transactions in cotton with the defenders, and also with the firm of John and Robert Cogan of that city; that Mr Robert and Mr John Cogan were, till 10th April 1865, partners of both firms; that Robert was in the habit of buying cotton for both firms from pursuers; and that the pursuers were in the habit of drawing on either firm at discretion, according to the respective liabilities of the firms. In Nov. and Dec. 1864, Cogan ordered a quantity of cotton from the pursuers, who invoiced it to J. & R. Cogan, and the pursuers drew three bills, dated 19th and 22nd Dec. 1864, and 2nd Jan. 1865, on John Bartholomew & Co., for £4177, £1706, and £2378; and two on J. & R. Cogan for £3865 and £1980. These were accepted and fell due in March and April 1865, but were not retired. Fresh bills were drawn by the pursuers, one on Bartholomew & Co. for £4173, and two on J. & R. Cogan for the rest of the sum; and were accepted. Thus, the larger amount of the debt was transferred to the Cogans; it did not appear by what arrangement, or whether by any arrangement. The original bills remained in the pursuers' possession. In April 1865 both Bartholomew & Co. and the Cogans stopped payment, and the pursuers ranked for the second bills on both estates and received dividends of 6s. 8d. on the Cogans', and 13s. per pound on Bartholomew & Co's estate, under reservation, as they say, of all their rights under the old bills. The pursuers maintained that the fresh bills were merely an additional security for the original debt. The defenders pleaded that the bills libelled on had been renewed and superseded by the second set of acceptances, on which, moreover, the pursuers had accepted composition, ranking for the full debt. They averred that there had been a uniform practice between the parties that, when bills were renewed, the old bills were not given up till the account or transaction was finally closed. The Lord Ordinary (Jerviswoode), before answer, allowed both parties a proof of their averments. The pursuer reclaimed, maintaining that the extinguishment of the bills could be proved only by writ or oath.

The Lord President said that the conclusions showed that this was not purely an action on the bills, but for the price of the cotton; and that the statement of the pursuers themselves showed that part of the price of the cotton had been extinguished by payment of the dividends. Practically the

aim of the action was to recover the dividend on the earlier bills now sued on also. That itself implied some inquiry. His lordship thought it competent to allow a proof before answer as to the transactions between these parties, as to the footing on which the bills remained in the hands of the pursuers, and as to the way in which some of the amount was extinguished. It would still be possible to hold, after the proof had been taken, that the rule of law contended for by the pursuers was applicable in the circumstances.

Lord Curriehill said that if this were a suspension of a charge, or if the action had libelled on the bills alone, or if the pursuers had made no admission as to payment of the dividends, the rule of law as to writ or oath would admit of no exception; and his lordship would enforce that rule, however suspicious he might be of the truth of defender's statement. But that rule did not always apply. In *Burns v. Burns*, 3 D. 1273, Lord Fullerton correctly stated the principle of law. Here the pursuers began by stating what the value consisted of. Indeed the action was not laid on the bills, but was an action for the price of goods sold and delivered. But this was only important as a judicial statement of the value for which the bills were granted. But they state, further, that the goods were ordered by and delivered to another party, and not to the defenders. This alone brought the case into an unusual position, and one calling for inquiry. There was no question as to the constitution of the debt, but only as to its subsistence. The question was, this party not having enforced his bill when it fell due, and having received other bills, and received a dividend on these, on what footing were such bills received? In conformity with *Burns v. Burns*, there should be inquiry. The *onus* was on the defenders, and the rule of law might still come into operation if they should fail to establish their averments. His lordship remarked that the action was brought for payment of the full sum, not giving credit for the dividends, and that alone was a reason for inquiry.

Lord Deas had no doubt as to one thing—viz., that although the summons was for payment of certain sums as the price of goods for which bills were granted, that did not exclude the pursuer from standing on the law of evidence applicable to bills of exchange. That was quite a correct, and indeed the only safe way of libelling, on the bills. It was a different matter whether, on the detailed statement of facts, the pursuer might not exclude himself from the benefit of that law. His lordship saw no incompetency in allowing a proof before answer.

Lord Ardmillan concurred.

The Court adhered.

Act.—Sol.-Gen. & Lancaster. Agents—H. & A. Inglis, W.S.——Alt.—Young & Gifford. Agents—Maconochie & Hare, W.S.

DUKE OF RICHMOND *v.* WHARTON DUFF—*Jan.* 25.

Deed—Construction—Fishing.

In 1829 Duff's predecessor conveyed the fishings of Orton in the Spey to the Duke of Gordon's trustees, in whose right the pursuer now is, "reserving always to me the said Richard Wharton Duff, and my successors in the said lands and estates of Orton, the privilege of fishing with the rod for our amusement only." The fishings were conveyed as then possessed by tenants conform to a tack, which reserved to Mr Duff and his successors, and to his friends, the right of angling, subject to the condition of paying for all salmon

taken. The Duke of Richmond brought this action for declarator that the right reserved was personal to Mr Duff himself individually, and that he had no right to delegate or communicate it to members of his family or to friends staying in his house, and for interdict. The Lord Ordinary (Barcaple) decerned in terms of the conclusions of the summons. The defender reclaimed.

The Lord President—The terms of the disposition are ample, and the reservation bears in itself to be a mere reservation in favour of the disponer and his successors individually. Looking to these words alone, I see no ground sufficient in law to enable me to extend the application of the words beyond Mr Duff and his individual successors in the lands, to whom in their own plain meaning they are limited. There was some speculation in the argument as to whether the reserved right might not come to be exercised by various persons, such as heirs portioners, or in the case of a subdivision of the lands of Orton. That may at some time raise a question, but in the meantime the question is whether it is a privilege that can be communicated by Mr Wharton Duff. I see nothing that can support that inference. It is a limited privilege on the face of the deed. I then look to see whether any circumstances are disclosed which could give to the limited reservation a more extensive application; but nothing is alleged that implies anything like a mutual construction of the clause. There was such matter in the case of Lord Aboyne *v.* Innes (6 Pat. 444), which was decided on the footing of subsequent usage. There is a reference to a lease which contains the usual clause descriptive of property let, as held by a particular tenant at the time. The question is raised whether certain conditions in it are imported or implied in the conveyance; but Mr Duff did not much found on the lease, and it may be said that it is a two-edged weapon, and that the sharper edge is against him. This clause, in its present terms, may have been an oversight on part of Duff, but we have no positive ground for saying so. It was a money transaction for a full price, and I see no ground to suppose that it was without full consideration that the proprietor of Orton limited the right reserved to himself individually and his successors. At all events, it is not in our power to alter what the parties have fixed for themselves by the terms of the deed.

Lord Curriehill concurred.

Lord Deas never found more difficulty in forming a satisfactory opinion the one way or the other. While it was certainly a question of intention, the parties had not expressed their deed so as to let it be seen what they meant. If they had intended to prevent the Court having any satisfactory opinion at all on that point, they could hardly have succeeded better. It was necessary to look to the nature of the right reserved, and Mr Duff's position as heritable proprietor of the fishings conveyed, and of the estate of Orton. The right reserved was an heritable right attached to the estate, not a personal privilege to Mr Duff, his heirs, or his singular successors. It was a right reserved for all time to the estate itself. If not that, it was, according to our law, nothing at all. If we stop in the reservation at the words "fishing with the rod," that would have been a right of angling, and it might have been an unlimited and exclusive right, and it is a heritable right which may be separately enjoyed. But there was a limit put on that by the words, "for our amusement only." Suppose

the "our" to be omitted, it would be impossible to say that that was a limitation to Duff and his individual successors. That limitation would only limit the purpose of the fishing. That brought it to the narrow question whether the "our" makes all the difference contended for. His lordship found it difficult to suppose that could be the meaning. If so Mr Duff must have been a more selfish man than his lordship could easily imagine him to have been. It manifested a desire for personal and solitary pleasure, which he could not believe to have been according to his nature. The reservation of right to keep a boat was certainly with a view to the fishing, and supported this view. It was the supposition, on the other side, that the right of angling in every way was given to the purchaser, subject only to the right of Mr Duff to angle also. His lordship thought that the right of angling was reserved to the estate, subject only to the limitation that it should be exercised only for amusement. Either view was attended with difficulty; but, on the other view, if Mr Duff died leaving six daughters, each would have a right to angle for amusement; or if he disponed his estate to seven sons, all the sons could angle; or if he divided his estate into portions as for villas, it would follow, as was fixed in the case of Loch Rannoch, that the privilege also would be divided. All that led to great embarrassment; and if their lordships had not thought differently, he would have thought the view he had suggested led to less difficulty. If the lease affected the question at all, it rather tended the opposite way from that in which the Lord President viewed the case.

Lord Ardmillan concurred with the majority, and the Court adhered.

Act.—Clark and Rutherfurd. Agents—Gibson-Craig, Dalziel, & Brodies, W.S.——Alt.—Sol.-Gen. and Adam. Agents—Tods, Murray, & Jamieson, W.S.

INGLIS & BOW *v.* SMITH & AIKMAN.—*Jan.* 26.

Arrestment—Breach—Petition and Complaint.

This was a petition and complaint for breach of arrestment. The petitioners had raised an action against Maclean, St John's, New Brunswick, and had arrested on the dependence the ship Julia Langley, lying at Glasgow, of which Maclean was part owner. Upon this arrestment being intimated to the other owners and Thomson Aikman & Co., the agents of the charterers, some correspondence passed as to loosing the arrestments on caution; but before any arrangement was completed, the law-agents of Thomson Aikman & Co. proposed that the vessel should in the meantime be allowed to proceed to the Tail of the Bank at Greenock to load gunpowder. This proposal was declined by a letter delivered on the same day; but, notwithstanding the ship proceeded next morning to the Tail of the Bank, whither she had to be followed and dismantled by a messenger sent after her by the arresters. The present petition and complaint was brought against the captain and the agent of the charterers in Glasgow, praying for reimbursement of expenses and such penalty as should be thought fit.

The defence was (1) That there was no attempt to remove the vessel beyond the jurisdiction of the Court, without which there could be no breach of arrestment; and (2), That even what was done was done innocently, and because the letter refusing permission to remove the vessel was not received till she had sailed down the river.

In the course of the discussion, the question was started whether, in a petition and complaint, the Court could award any sum for expenses, or any sum demanded as civil redress. It was maintained by the respondents that such a petition was for punishment and nothing else, for a penalty to be paid, not to the party, but to the Crown. If the application was found to be unjustifiable the petitioners themselves would be liable in damages instead of recovering them. Authority referred to—*Bell v. Jamieson*, 24th June 1848, 10 D. 1413.

The LORD PRESIDENT—This application is not of a usual kind. I don't recollect of any application praying for the punishment of a breach of arrestment as a contempt of Court. In cases of breach of interdict, that is common enough. I don't mean that a party is entitled to violate an arrestment, or that it is not an offence to be punished; but it is not made by the Statute, and has not hitherto been treated as contempt of Court. It is not quite parallel with breach of interdict. Arrestment is obtained as a matter of course, while an interdict is an ordinary sentence of the Court. The respondents' contention that, notwithstanding the arrestment, the master and owners were entitled to take the ship away provided they did not take it beyond the jurisdiction of the Court, or more than three miles from the coast, appears quite extravagant. But arrestment is also distinguishable from interdict, because it is every day made a matter of arrangement how it is to be observed. We must, therefore, consider the arrangement between the parties. Here there was clearly a communing as to consenting that this vessel should have a certain license as to loading and preparing for sea; and if it does appear that there was a misunderstanding as to this arrangement, it is difficult to hold that the kind of criminality pointed at in the petition and complaint has been incurred. Here there seems really to be some reason to suppose that there was to be an arrangement, and a party became security for its fulfilment. I don't think this is the kind of criminality that calls for punishment, though there was some rashness and a violation of the strict letter of the law. On the other hand, an incompetent demand is made—viz., the demand for expenses. It may be that the vessel going down the river caused additional expense, but that is part of the expense of the proceedings which, if they succeed, the petitioners may recover in the cause in which the arrestment is used.

The petition was dismissed, and neither party found entitled to expenses.

Act—Young and M'Lennan. Agents—Morton, Whitehead, and Greig, W.S.——Alt.—Sol.-Gen. and Gifford. Agent—John Ross, S.S.C.

PET.—FOWLER & SALTER.—*Jan.* 30.

Burgh—Managers.

The Burgh of Kilrenny was disfranchised in consequence of an error in the election of magistrates by a judgment of the Court in 1829, when interim managers were appointed. This was a petition by managers appointed in 1847, who desired to resign, for the appointment of successors with certain powers. The Court granted the prayer with the exception of the powers to discharge the duties of bailies of the said burgh, to conduct the judicial business of the said burgh, to appoint one of their number to

act as a Commissioner of Supply for the County, and to appoint a Town-Clerk, Procurator Fiscal, and other officers. These powers had not been exercised in the burgh for thirty-eight years, and, the Court thought, need not be granted now, and a special application might be made for authority to appoint a Town-Clerk when it became necessary.

Act.—Cook. Agents—T. & R. Landale, S.S.C.

JOHNSTONE BEATTIE *v.* J. J. H. JOHNSTONE.—*Feb.* 5.

Husband and Wife—Divorce—Marriage Contract—Provision—Annuity—Act 1573, c. 55.

By antenuptial contract, dated January 1860, the defender bound himself, during his lifetime, to pay to his son, whom failing, to the pursuer, whom failing, to the children of the contemplated marriage between his said son and her, an annuity of L.200. The pursuer now claims the annuity as payable to her in consequence of the dissolution of the marriage by decree of divorce obtained by her on 17th March 1865 against her husband for adultery. The Lord Ordinary (Kinloch) decided in favour of the pursuer.

The defender reclaimed. Authorities cited—Act 1573, c. 55; Stair i. 4.20; Bell's Pr. 1622; Ersk. i. 6.46 sq.; Bankt. I. 5·134; *Justice* v. *Murray*, M. 334; *Thom* v. *Thom*, 11th June 1852, 14 D. 861; *Macalister* v. *Macalister*, 26 Sc. Jur. 597; *C. of Argyll* v. *E. Argyll*, M. 327; 1 Bell's Com. 634; *Dirleton* v. *Jus mariti*; Wallace's Inst. p. 230 sq.; *Calder* v. *Ross*, M. 6167; Lord Mackenzie's *Roman Law*, pp. 110, 114. Before advising, a minute was lodged, stating that neither party desired that any other parties should be called, the defender not insisting in his plea of incompetency on the ground that the assignees of the husband were not called.

LORD PRESIDENT. This case is not free from difficulty. The question is—Whether, by reason of the decree of divorce obtained by the pursuer against her husband, the annuity of L.200 is now payable directly by him to the pursuer? The obligation is one of several provisions contained in the antenuptial contract of the parties. By that contract the husband disponed to trustees various interests he had in deeds mentioned, and the father of the intended wife, and she conveyed also certain interests she had to the same trustees. Provision was made for payment of certain sums to the intending husband, in the event of the death of his father and father-in-law; and there were provisions for children. The annuity of L.200 gives rise to the present question. In its conception and terms it is, in the first place, an obligation to pay to the son; but the divorce having occurred the wife contends that she has now right to receive the L.200 during the life of Mr Hope Johnstone, senior. On the other hand, he contends that it is not payable to her till his son's death. It is contended, on the one side, that the words "whom failing" mean "failing by death" only; and on the other, that they truly mean failing by the cessation of the relation of husband and wife by the misconduct of the former. I am of opinion that, when this contract was framed, there was not in the contemplation of any of the parties any failure but the failure of the husband by death. But that does not necessarily solve the question. The question remains, when the marriage was dissolved by the divorce of the husband, and

when the object for which this provision was made has been disturbed by that event, what are the rights of the party wronged. It is important to observe that this is not a separate and independent bond of annuity by the father to his son. It is contained in a contract of marriage intended to provide for the maintenance of the wife in the event of her survivance. It was not, indeed, provided by the husband directly, but by his father; but there can be no doubt of the onerosity of such an obligation. The contention, however, is that the conditions subject to which it was undertaken have not been fulfilled to the effect of raising up the rights of Mrs Johnstone Beattie. But if she has a right, it depends not merely on the words of obligation, but on the way in which the law of divorce operates on such provisions. Some things are very clearly operated on by the law of divorce. Rights provided to the wife by the husband generally become due on their being separated by his divorce for adultery, just as if the marriage were dissolved by his death. The general principle of the law is not disputed. Here the question is as to an obligation undertaken by a third party. That, however, is not the most important consideration, but rather the nature of the transaction in reference to which the obligation was undertaken, and the purposes it was intended to fulfil; and, seeing that it was undertaken entirely in the view of the marriage being dissolved, and for the comfortable subsistence of the wife, it belongs to the class of obligations which emerge to the wife on the divorce of the husband in the same way as by his death. The great argument urged for the defender is that it imposes on the father of the husband a double obligation, he being still under a moral or natural obligation to maintain his son. I think that is not a sound answer. Many cases might be figured in which the natural obligation might arise after the father had made such a provision as this. It is not necessary to look further than the present case to see that that misfortune might befal a father in various ways. There is no restraint in this deed on the son's disposing of this annuity; and it appears on the record that he has actually done so. The question might arise as between the assignees of the husband and the granter of the obligation; and it would be no answer to them that a moral obligation is thereby added to the conventional obligation to pay the annuity. So also the annuity may be attached by creditors of the husband from time to time, and the father may yet obtain no relief from the original natural obligation.

Lord Curriehill had great difficulty, chiefly from these peculiarities:—(1) That this was a personal obligation; (2) that the failure contemplated was manifestly failure by death; (3) that the gift was absolute and unconditional, there being no condition that it should not be assignable or attachable by creditors; (4) that, in the exercise of the right, the husband had, in fact, assigned it away, thus transferring to the assignees the *jus crediti*. The question came to be in reality whether the decree of divorce had the effect of transferring the *jus crediti* from these assignees to Mrs Johnstone Beattie. Full effect should be given to the provision of the Act 1573; but the question here was—Do the assignees tine their right in consequence of the divorce? It was a difficult question; but his Lordship could not see how this could come under the Act 1573. The Act had, indeed, been extended to rights proceeding from third parties; but in all the cases cited the right had already vested in both spouses—it was a conjunct right. There was no case in which it had been applied to a donation from third

parties, unless that third party were denuded, and the subject of the provision vested in the spouses. A very nice question would have arisen if Mr Hope Johnstone, senior, instead of obliging himself to pay an annuity, had bought an annuity from an insurance office and assigned it to the spouses, on the footing that the lady's right should commence on the death of the husband, for she would then be one of the owners of the right from the beginning. That was not the case here. Neither of the cases of Justice and Thom referred to a mere personal obligation, in which during his life the husband was the sole creditor. His Lordship must have differed even if the question had been with the son himself. Still less could third parties, having acquired the right for an onerous consideration, forfeit it by the fact that their author's wife had obtained decree of divorce against him. In another aspect of the case there was difficulty. This right was a proper annuity—a heritable right. It might be contended that for this reason Mrs Johnstone had right to it from the date of her marriage. Although his Lordship had vacillated upon this matter, it did not lead him to a different result. The wife and children were successors one of the other, and Mr Johnstone as institute was absolute owner during his life, with power to convey, and the right of his assignees could only terminate at his death. His Lordship could not hold the divorce to create a devolution.

Lords Deas and Ardmillan concurred with the Lord President; and the Court adhered, with expenses.

Act.—Fraser and M'Kie. Agents—Jardine, Stodart, & Fraser, W.S. ——*Alt.—Young, Gifford, and Hope. Agents—Hope & Mackay, W.S.*

Marshall *v.* Wink.—*Feb.* 14.

Sequestration—Appeal.

The trustee on a sequestrated estate rejected a preferential claim by a law agent on a certain fund. The claimant appealed, and the trustee stated, among other preliminary pleas, that the appeal was incompetent, in respect that the trustee had, at the same time that he rejected the appellant's claim, sustained a claim by Mr Wotherspoon, which exhausted the whole fund, and that, no appeal having been taken against that deliverance, it was now final; and (2) that at least the deliverance in Mr Wotherspoon's favour was *res judicata* in reference to the fund in dispute.

These pleas were repelled.

Act.—Johnstone. Agents—Marshall & Stewart, S.S.C.——*Alt.—Scott et Gifford. Agents—J. Walls, S.S.C., and W. Wotherspoon, S.S.C.*

Miles *v.* North British Railway Company.—*Feb.* 16.

Title—Trust—Declaratory Adjudication—Lands Clauses Consolidation Act.

Petition for warrant to uplift money consigned as the price of subjects obtained by the Company under compulsory powers, and consigned as a condition of entering on lands. It was afterwards agreed that the sum consigned should be the price of the subjects. The company objected that the title offered by the petitioner was insufficient. The only objection insisted in arose in connection with a conveyance in 1807 by the original feuars

to the Incorporation of Barbers of Leith. The title was taken to Henry Johnson, deacon, and Wm. Andrew, boxmaster, of the corporation, for themselves, and as representing the corporation, in terms showing that, though the feudal title was in them, it was *qua* trustees for the corporation. It was a condition of the title that the persons who were to have power to sell were not the disponees, but the deacon and boxmaster for the time, and only when specially authorised by the corporation. The trustees were infeft. In 1817, the corporation duly granted authority to sell the subjects, and a disposition was executed by the then deacon and boxmaster, and concurred in by William Andrew, who had ceased to be boxmaster. Henry Johnson was dead. After several subsequent transferences, the petitioner obtained the beneficial right by charter of resignation in 1861. The objection was that the feudal title had been in *two* trustees, of whom only one concurred in granting the conveyance; and that half the subjects were in the *hæreditas jacens* of Henry Johnson.

Lord Currriehill said there was a good contract of sale by the corporation, who had the beneficial right. Johnson was only a trustee, and his heir could never have been served and retoured as nearest lawful heir in these subjects. The first answer to the objection was that the trust had been vested in two individuals, one of whom was still alive when the time came for denuding. It was said that the fiduciary right did not accresce; but he would not express an opinion as to that point. It was enough that the beneficiaries had transferred their beneficial right *habili modo* to the company, who might take what steps they pleased to complete their own title. It had long been settled that, where subjects are vested in trustees who die not denuded, the beneficiaries or persons in their right may complete their title by declaratory adjudication. A century ago there was great difficulty as to this; but the rule referred to was solemnly determined in 1756 and 1758 (*Dalziel* v. *Henderson and Dalziel*, M. 16,204, App. Trust, 1; *Drummond* v. *Mackenzie*, M. 16,206, 1 Ross L. C. 320). His Lordship referred also to *Gordon's Trustees* v. *Harper*, Dec. 1821, F. C. (1 Ross, L. C. 499), and to summons of declaratory adjudication in the Juridical Styles. The seller here did not ask the company to make up his title.

The Court adhered to the interlocutor of the Lord Ordinary (Mure) repelling the objection.

Act.—A. R. Clark and J M'Laren. Agents—White-Millar & Robson, S.S.C.——Alt.—Sol.-Gen. and Thoms. Agents—Dalmahoy & Cowan, W.S.

Thomson *v.* North British Railway Company.

This was a petition similar to the preceding, involving the objection that a disposition to 1806 had not the word "dispone" in the dispositive clause, in which the words were "sell, alienate, and make over." It contained an obligation to infeft, procuratory of resignation, conveyance of writs and evidence, a precept of sasine, and obligation of absolute warrandice.

Lord Currriehill said there was at all events a good contract of sale, giving a right which was transferred to the present petitioner, who had conveyed it to the railway company. The case was to be decided on the same principle as the last, and the objection repelled.

CONNELL *v.* GRIERSON.—*Feb.* 20.

Entail—Succession—Destination of Heritage to "next of kindred."

Two actions of declarator at the instance of James Walter Ferrier Connell and his administrator-in-law, to have his right as heir of entail to the estates of Over Kirkcudbright and of Auchenchain declared, and certain titles made up in the person of the defender reduced. The question depended on the meaning of the clauses of destination in two entails made in 1779 by William Collow. It was decided (Feb. 23, 1866, 4 *Macph.* 465) that the final destination in the deed of entail "to my own nearest of kindred, and their heirs and disponees whomsoever," contained a good tailzied destination effectual against prior substitutes; and that Mr. Gilbert Collow, the last substitute in possession, who died in 1863, had held under the fetters of a strict entail. Connell now claimed as nearest heir-female under the second branch of the destination, and also, assuming that contention to fail, under the final destination to the testator's own nearest of kindred and their heirs, as being his nearest heir of heritage as great-great-grandson of his brother. Miss Grierson claimed under the final destination as nearest of kin to the entailer, being his sister's grand-daughter.

Lord Curriehill: The first branch of the destination to the heirs-male of grandsons had failed. The first question arose under the first step of the second branch, which was to the heirs-female of John Collow, the institute. The question was as to the meaning of the words heirs-female. If these words were to be taken in the ordinary sense, so as to be equivalent to the heirs whomsoever of John Collow, though females, these would not have failed. It was, indeed, admitted that, if John Collow's heir-female general was entitled to succeed, the pursuer should have his declarator; but otherwise, if the words should be properly construed to mean, according to the intention of the testator, heirs-female of the body of John Collow. In the latter event, that branch of the destination had entirely failed. In the ordinary case, a destination to heirs-female had a very wide signification, being equivalent, in fact, to one to the heir-at-law. The term must be read in its ordinary sense, unless the context shows that the entailer used it in a different meaning.

After examining the terms and tenor of the deed his lordship came to be of opinion that the words might be understood in their narrower sense, and that therefore the pursuer's claim under this head could not be sustained. The third branch of the destination, which was to certain collaterals, had failed, and was not in question. The fourth was to persons to be nominated by the testator, which he had not done, and to his nearest of kindred. The question therefore was, who were to be understood by next of kin in a destination of heritable property? The words had no fixed meaning in the law of Scotland, and it was necessary to penetrate into the mind of the testator himself. He intended the party succeeding to the lands to be in the position of an heir of entail, which implied that he should be able to serve as heir of entail to him; otherwise he could not have the necessary qualification. It was to be presumed also that only one person at a time could be served and retoured in that capacity. He must also be of th blood of the testator. The difficulty was how the propinquity was to be reckoned. There were various rules in different countries; and even in

Scotland there were different rules in regard to heritable and movable property. The defender argued that you must count the natural degrees. If so, there might be a multiplicity of heirs. There might be two or there might be twenty, according to circumstances, and the parties so called might belong to different families. This might go on to future generations, the successors of each serving on their predecessor's death to his *pro indiviso* share. That was altogether inconsistent with the law of entail, according to which, even in the case of heirs portioners, the entail is broken unless the succession of all but one of them is excluded. The defender, therefore, did not venture to maintain the doctrine to the full extent, but only that the next of kin entitled to take movable estate were intended. But this only diminished the absurdity by avoiding the calling of descendants and collaterals in the first instance. The absurdity still remained in regard to descendants. If the rules of succession were to be brought in, it must be the rules of succession to heritage. The entailer must have had reference to the feudal law, which takes into account, not only degrees of propinquity, but lines, sex, and primogeniture. In fact, the heir-at-law must be sought for. This view was corroborated by the other parts of the deed. The judgment of the Court was, therefore, for the pursuer on the fourth branch of the destination.

Lord Deas and Ardmillan concurred; and Lord Curriehill intimated that he was authorised to state that the late head of the Court (Lord-President M'Neill) had in consultation agreed with the judgments that had been delivered.

In the second action between the same parties, relating to the Auchenchain entail, a similar judgment was pronounced.

Act.—Millar and Marshall. Agents—A. & A. Campbell, W.S.——Alt.—Clark and Lee. Agents.—Mackenzie and Kermack, W.S.

SECOND DIVISION.

FITZWILLIAM *v.* FREELAND AND LANCASTER.—*Jan.* 24.

Process—Proof—29 & 30 Vict., cap. 112, sect. 3.

This case having been remitted to the Lord Ordinary to take proof, one of the parties lodged a specification of documents, and moved for commission and diligence for recovery thereof. The Lord Ordinary doubted his power to grant the commission, because, though he happened to be the Judge in the cause, the Court might, under the Act, have remitted either to one of themselves or to any other of the Lords Ordinary. He was inclined to hold that his powers under the remit were simply ministerial, and that he could not delegate to a commissioner. The motion was then made before the Second Division. After consultation with the other Judges, the Court was of opinion that the Lord Ordinary's views as to his functions under sect. 3 of the statute were correct, and accordingly granted commission for the recovery of documents,—recommending that for the future, in case of similar remits, parties should consider whether they were likely, before concluding their proof, to require any such commissions, and if so, to move the Court to that effect. The Court would thus, when remitting,

appoint a commissioner to take the depositions and exhibits of havers in terms of specifications, to be adjusted by the Lord Ordinary, or grant such other commission as might be necessary.

Act.—Watson. Agent—J. Henry, S.S.C.——Alt.—Millar. Agent—James Webster, S.S.C.

DIXON AND OTHERS *v.* JACKSON.—*Jan.* 26.

Trade-mark—Interim interdict.

Interdict for infringement of the trade-marks of the complainers, who, as well as the defender, are iron manufacturers. In the complainers' price-list, their iron was entered as stamped Govan * iron, while the defendant had had some of his marked Coats * iron. The Lord Ordinary, while he passed the note to try the question, did not think this so clear an adoption of the complainers' trade-mark as to entitle them to interim interdict. The complainers reclaimed against the latter part of the interlocutor.

LORD JUSTICE-CLERK. The complainers allege that this trade-mark and the name star iron are well known in the trade, particularly in foreign markets, and that it was exclusively used by themselves. The respondent has not specified any instance of the mark being used by other parties. It was clear that Dixon had used it for some time, that it had some signification in the market, that no one else had used it, and that the respondent's use of it was recent, sudden, and unexplained. He states that he recently adopted it in a single instance at the request of a customer (Herts). In these circumstances, if the complainer's case ultimately turns out to be good, they might sustain great injury if interdict were refused, whereas the respondent can sustain none by its being granted.

LORD COWAN had difficulty, but did not dissent.

LORDS BENHOLME and NEAVES concurred with the Lord Justice-Clerk.

Act.—Young and W. M. Thomson. Agents—Melville and Lindsay, W.S.——Alt.—Clark and Gloag. Agent—A. G. Ellis, W.S.

PTN.—BALLANTYNE—*Jan.* 26.

Bankruptcy—Recal of Sequestration.

Petition by a creditor for recal of the sequestration of Jeffrey. The account of the concurring creditor, upon which the sequestration was awarded, amounted to L.57, 10s., the two last items being—"Cash lent you, L.10; amount of goods, L.17." No vouchers or documents of debt were produced. The petition for recal was presented on this ground. The Lord Ordinary (Mure) refused the petition, on the ground that the petitioning creditor had acquiesced by appearing in the sequestration. The Court reversed Lord Ordinary's judgment, and recalled the sequestration.

LORD JUSTICE-CLERK. The statute confers upon any creditor the right to petition for recal. This was not an open account with a tradesman. The last two items clearly required vouchers. The want of these was a statutory ground for refusing sequestration, and if so, one for recalling. As Bell explains (Com. ii. 331), sequestration may be recalled on legal grounds or grounds of expediency. This is a legal and statutory ground, and we have no alternative. The creditor was in no way barred by attend-

ing to his interests in the sequestration. The recal has not always the effect of annulling all that has taken place in the sequestration.

Lord Benholme observed that there was an important distinction between flaws which appeared *ex facie* of the proceedings such as this, and latent incompetency. In the latter case, there might be room for the plea of personal bar, but not here.

The other Judges concurred.

[*Authorities*—M'Nab *v.* Hunter, Dec. 13, 1851, 14 D. 183; Ure *v.* M'Cubbin, May 28, 1857, 19 D. 758; Campbell *v.* Myles, May 27, 1853, 15 D. 685; Johnston *v.* Baird, July 18, 1840, 2 D. 1463.]

Act.—Scott. Agents—Macgregor & Barclay, S.S.C.——Alt.—M'Lennan. Agents—Ferguson & Junner, W.S.

Howden *v.* Fleeming and Others—*Feb.* 1.

*Succession—Entail—Clause of Devolution—*19 *and* 20 *Vic., cap.* 79, §§ 102, 106.

John Baron Elphinston died in Jan. 1861. His estates were sequestrated in 1862. The trustee on his sequestrated estate presented this petition under secs. 102d and 106th of the Bankruptcy Act 1856, to the Lord Ordinary on the Bills, praying that the estate of Duntiblae, among others, should be declared to have been transferred to, and vested in, the petitioner at the date of the sequestration. Duntiblae was originally held under the same entail (executed in 1741) as the estate of Wigtown. That deed contained a clause by which, as soon as any heir in possession succeeded to a peerage, the estate was made to devolve on the next substitute. Duntiblae was sold under a private Act of Parliament, but was afterwards repurchased, and again entailed in precisely the same terms as before. But the latter entail, executed in 1847, was not recorded in the Register of Entails, and consequently was ineffectual as an entail under the Act 1685. John, Lord Elphinstone, succeeded to the peerage in July 1860, and died in January 1861. He appears to have contracted debt both before and after his succession. The person next entitled to succeed to the estates was the late Lady Hawarden. The present petition was opposed by her son, the Hon. Cornwallis Fleming. He contended that Duntiblae having *ipso facto*, on Lord Elphinstone's succession, devolved upon Lady Hawarden, it was not heritable property belonging to his Lordship at the time of his death, and could not be carried by his sequestration. In a suit between the same parties, it was decided by the whole Court (Hawarden *v.* Elphinstone's Trs., Feb. 2, 1866, 4 Macph. 353; *ante*, vol. i., p. 66.) that the rents of the Wigtown estate, of which the entail is valid, accruing after the succession to the peerage, and which had been claimed and rendered litigious before the sequestration, belonged to Lady Hawarden, and were not carried by the sequestration. Lord Elphinstone remained in possession of Duntiblae till his death. Lady Hawarden took no step to make the clause of devolution effectual in her favour, and afterwards made up her title by serving heir-in-special to Lord Elphinstone, as the person who had died last vest and seised in these lands.

The Lord Ordinary (Benholme) refused the prayer of the petition. The Court reversed.

The Lord Justice-Clerk—The entail being quite inoperative, Lord

Elphinstone was proprietor in fee-simple, at all events before his succession to the peerage. He was entitled to deal with the estate as he pleased up to that time. Had the estate been entailed, his successor would have been entitled to receive it free from the burden of his debts; but as Lord Elphinstone was fee-simple proprietor, it is admitted that his creditors might have attached the estate before his succession; and I think they might equally well have done so after his succession to the peerage for debts contracted before that event, supposing his right to the estate to have absolutely determined then. It would be difficult to place the claims of creditors whose debts arose after the succession upon a different footing. Lord Elphinstone was feudal proprietor in possession of the estate. Creditors were entitled to trust to his infeftment, by which he appeared as proprietor in fee-simple. A clause of devolution can have no greater effect than a simple destination. Either may be effectual *inter hæredes*, but not in a question with creditors. His Lordship referred to the cases of Smollett, M. App. Tailzie, No. 12; Lord Eglinton (9 D. 1167, 6 Bell's App. 136); and E. Marchmont *v.* Horne, 5 Br. Sup. 103.

Lord COWAN concurred. It was not necessary to decide whether creditors between the succession and the death could come in, but he thought no sound distinction could be drawn between them and the others.

Lord BENHOLME dissented. The devolution might have been defeated before the succession, as the estate was not protected by fetters of entail; but as it had not been defeated, it took place *ipso facto*. From that time Lord Elphinstone's infeftment was fiduciary, as a mere trustee. The devolution clause was a condition which entered his infeftment, which creditors might see. The case was ruled by the previous suit as to the rents of the Wigtown estate.

Lord NEAVES concurred with the majority. The devolution clause was not a condition in the technical sense. It was not a real burden which followed the land and attached to singular successors. It was merely a personal obligation, and remained perfectly inoperative till some step was taken to enforce it.

Act.—Advocatus, Dean of Faculty, and Fraser. Agents—Scott, Moncrieff, and Dalgety.——Alt.—Pattison. Agent—Thomas Ranken, S.S.C.

BELL'S TRUSTEES *v.* MORHAM AND OTHERS—*Feb.* 6.

Expenses—Trust.

The late Mrs Bell left, in addition to her settlement, four writings containing legacies, under which the legatees claimed as being valid testamentary writings. On March 20, 1866, the Court, by a majority, altering the judgment of the Lord Ordinary, decided against the validity of three of these writings. When the case went back to the Lord Ordinary, his Lordship found no expenses due to or by the parties who had claimed under these writings. The claimants reclaimed, maintaining that, in a question of difficulty, the parties were entitled to their expenses out of the fund *in medio*; but the Court adhered.

Act—Clark and Watson. Agent—Wm. Miller, S.S.C.——Alt—A. Moncrieff & Gloag. Agents—Burn, Wilson, & Gloag, W.S.

GRAY *v.* GRAY.

Process—Divorce—Additional Proof.

In this action of divorce, proof was led to the effect that a woman representing herself to be the pursuer's wife had committed adultery with the co-defender. But the wife, who had been cited as a haver, did not appear, and her identity was not proved. The Lord Ordinary, however, held the proof to be sufficient, and pronounced decree of divorce. The defender reclaimed. The Court, being of opinion that the proof was incomplete for want of identification, desired to hear argument on the competency of opening up the proof for the admission of further evidence after hearing counsel.

The LORD JUSTICE-CLERK said that, when a party preferred a criminal charge like adultery, he was bound to prove his case, and ought not to be allowed a second opportunity. It was not a mere technicality. Till the identity of the party was proved, nothing was proved. It would be a very bad example to allow a party, after judgment, to supplement his proof when he found the judgment would not be supported. This was different from cases of declarator of marriage, where the interests of other parties were involved, and where the Court *ex proprio motu* sometimes ordered further inquiry. The defender must be assoilzied.

Lord COWAN dissented. He thought the Court had power to open up the proof, and that it should be done here. Adultery was no doubt a criminal charge. But that made no difference, for here it was prosecuted only *ad civilem effectum*.

Lords BENHOLME and NEAVES concurred with the Lord Justice-clerk.

Act.—Hope. Agents—Stewart & Wilson, S.S.C.——Alt.—W. A. Brown Agent—James Bell, S.S.C.

KINLOCH, &c., *v.* BELL.—*Feb.* 12.

Teinds—Valuation—Reduction—Title to Sue.

Reduction of a valuation of teinds. The pursuers are Dalrymple of Hailes, as titular of the parish of Athelstaneford (who, however, retains no right to the teinds, which are all heritably disponed), Sir David Kinloch (patron), the minister, and three heritors who have heritable rights to their teinds. The defender's valuation was not produced by him in the two last localities in 1822 and 1859; but he afterwards in 1863 founded upon it in a reduction of the decrees of locality and final scheme, still pending, in which he called the present pursuers as defenders. Upon their stating in that action certain objections to the valuation, it was replied that a reduction of it must first be brought. Hence the present action. Preliminary defences were stated of—1. No title to sue; 2. Negative prescription. The Lord Ordinary (Barcaple) repelled the first, but sustained the second of these, and assoilzied the defender. Both parties reclaimed.

Lord Justice-Clerk—As regards the first branch of the case, the titular, having been divested of all right, is no longer titular, and can have no title to sue. On the other hand, the patron and the minister have a clear title. The case of the heritors presents more difficulty. The principle is fixed that heritors who have no heritable rights to their teinds, being liable to pay the full amount of these teinds, either to the titular or the minister, and to be localled upon *primo loco*, have no title or interest to object to a valua-

tion in a locality, and still less to reduce one. (Abercromby *v.* Erskine, M. App. Teinds 8; D. of Buccleuch *v.* M'Knight; 3 Macph. 1111). When they have heritable rights, they have obviously an interest to object, because an undervaluation might throw the burden sooner on them, when the free teinds were exhausted. I think that heritors in that position have also a right to object to valuations produced in a locality on certain grounds. Not on the merits, because it is not even necessary to call them as defenders in a valuation; but when the decree is *ex facie* invalid—for example, if pronounced in a Court not competent, or when all parties were not called, or if the lands said to be valued were not embraced in it. It does not follow, however, that they are entitled to sue a reduction. They are not, because they are not entitled to state those objections on the merits, which require reduction. The heritors here are entitled to state as defences to Mr Bell's reduction of the final scheme of locality, all the objections which they could plead *ope exceptionis* in the locality. Therefore, we ought to find that only the patron and minister have a title to pursue. As to the second point, the Lord Ordinary has found that all the reasons of reduction are barred by the negative prescription. But some of the reasons averred would amount to *ex facie* nullities, to which the negative prescription does not apply; and I think we should remit to his Lordship to consider whether any grounds of that character are established.

The other Judges concurred, Lord Cowan doubting whether the heritors had no title to sue a reduction when the titular had parted with all his right; but as all the pleas were open to them in this case by way of exception, he did not dissent.

Act.—Webster and Balfour. Agents—Gibson-Craig, Dalziel, and Brodies, W.S.——Alt.—Sol.-Gen. and Duncan. Agent—J. T. Mowbray, W.S.

(Whole Court).

DEANS OF THE CHAPEL-ROYAL *v.* BROWN'S TRUSTEES.—*Feb.* 20.

Teinds—Valuation—Reduction Titular—Positive and Negative Prescription.

Reduction of a valuation of the teinds of defenders' lands in the parish of Kirkhope, of which the Crown is titular, and the Deans of the Chapel-Royal are donatories. The valuation is a decree of the High Commission in 1647, at the instance of Elliot of Stobs, heritor of the lands, against the Earl of Buccleuch and the minister. The latter did not appear, and the valuation proceeded upon an agreement between the pursuer and the Earl, who is described as "tacksman and titular" of the teinds. The Lord Ordinary assoilzied the defender. The pursuer reclaimed to the Second Division; and cases were ordered, and sent to the whole Court. The decree was assailed chiefly on the ground that the Earl of Buccleuch was not the titular, and that the titular not having been called, the valuation was intrinsically bad.

The Lord President, Lords Curriehill, Deas, Jerviswoode, Barcaple, and Mure, held that the Lord Ordinary's interlocutor ought to be adhered to. The decree purported to be a regular valuation of the teinds, not for the

period of a tack, but in all time coming. The Earl of Buccleuch is described on the face of the document as titular. Therefore, assuming it to be necessary to call the titular, the decree is *ex facie* regular. Reduction of it was not sought within forty years, and therefore is now incompetent by the negative prescription. Further, the *onus* of proving that Buccleuch was in fact not titular, lay on the defenders, and they had failed to do so. The character of titular was not inconsistent with that of tacksman. The valuation had not been challenged for 200 years, and, on the contrary, the pursuers had recognised and homologated it. Lords Curriehill and Barcaple were further of opinion that the proceedings of the High Commission of that time not being necessarily judicial, it was not essential to call the titular, though he might have appeared within the prescriptive period to insist on any prejudice done to his interest being rectified.

Lords Ardmillan, Kinloch, and Ormidale, thought the decree ought to be reduced. It appeared from the decree that Buccleuch was not called as titular. His description in the agreement as tacksman and titular was ambiguous and insufficient. It had been proved in point of fact that he was not titular. It was fatal to the decree that the titular was not called. The negative prescription did not apply to such a case, and no case of homologation or adoption was made out.

At advising, Lord Cowan concurred with the majority of the consulted Judges.

Lord Benholm concurred. He held that the pursuers' claim was cut off, not only by the negative prescription, as the majority of the Judges held, but also by the positive. The positive prescription had been extended from infeftments to tacks, and especially of teinds, and *a fortiori* it ought to apply to so important a possession as that conferred by a valuation—Macintyre *v.* Maclean, 7th March 1828. There had also been homologation.

Lord Neaves concurred with the minority. He earnestly demurred to the doctrine that the positive prescription could apply to a valuation of teinds. The negative prescription was equally inapplicable in the particular case. It could not cut off the right to say that the person who made the agreement was not his author, and did not represent his interest. There was no reason to suspect that the Earl was titular.

The Lord Justice-Clerk concurred with the minority. The terms of the decree left it ambiguous whether it proceeded on an agreement between the heritor and a tacksman or the heritor and titular. He thought the fair reading was the former; and if that could be controlled by extraneous evidence at all, the burden lay on the defenders, who had failed to make out their case.

The Court adhered to the Lord Ordinary's interlocutor.

Act.—Cook and H. J. Moncreiff. Agent—James Allan, S.S.C.——Alt. —Clark and Nevay. Agents—Mackenzie and Kermack, W.S.

THE

JOURNAL OF JURISPRUDENCE.

THE FRENCH BAR.

(Continued from the March Number of the Journal.)

DURING the period that elapsed between the earlier part of the 18th century and the French Revolution, a variety of causes combined to increase the popular discontents with the existing order of things, and to prepare the way for a great and violent change. The barriers that protected the privileged, but generally corrupt, higher classes from the indignation that had gradually been growing in fierceness and intensity in the hearts of the oppressed lower orders, were ever growing weaker and weaker. The people were becoming conscious of their strength, and were beginning to question the doctrine of divine right and of passive obedience, and to doubt that the unprivileged many were created for the sake of the privileged few. The writings of Montesquieu, Voltaire, Beccaria, and the Encyclopædists, were everywhere eagerly read and applauded, and forced onwards the approaching social change. In fact, the upper classes in France were slumbering in false security above an abyss which was ere long to open and engulf the throne, the church, the nobility, the parliament, and the bar. The brief but scandalous orgy of the Regency; the profligacy and extravagance of the long reign of Louis the Fifteenth which succeeded it; the misery of the people from whose poverty was wrung out the means of supplying the luxury of the Court; the disorder of the finances; the atrocity of the criminal laws and their maladministration, as exhibited in the famous processes of Calas, Sirven, Lally-Tolendal, and others—these, and many other causes, contributed to the overthrow of the ancient régime. Reform was

not granted in time; revolution came in its place. It is to the honour of the French Bar and the French Magistracy that they took a prominent and leading part in attempting to bring about those moderate and seasonable changes which might have averted the revolution. The most telling and brilliant attacks upon the existing system of criminal jurisprudence—which was secret in its procedure and cruel in its punishments, and under which the accused was denied a defender, and might be kept for years languishing in a loathsome dungeon before being brought to trial—were made by Dupaty, Advocate-General to the Parliament of Bordeaux, and by Servan, Advocate-General to the Parliament of Grenoble. The following passage occurs in a discourse delivered by the latter in 1766 on the administration of justice:—"Our laws everywhere and indiscriminately are prodigal of the penalty of death; crimes the most different, the most atrocious, and sometimes the slightest, are confounded in the same punishment. I proclaim it to timid men, superstitious adorers of every ancient usage; I proclaim it to violent men, who shroud the head of justice in a cloud, and only suffer her arms to be seen; I proclaim it to all; whilst our criminal laws shall subsist, as a citizen I shall never fail to obey them, as a magistrate I shall never fail to make them obeyed by others; but as a friend of humanity I shall ever desire their reformation." Some of the most illustrious lawyers in France seem to have clearly foreseen the great revolution long before it took place; and one of the most remarkable foreshadowings of it is to be found in a discourse pronounced by the Advocate-General Seguier, nearly 20 years before the event:—"An impious and audacious sect," he says, "has risen up in the midst of us; it has adorned its false wisdom with the name of philosophy, and under that imposing title it has laid claim to the possession of all knowledge. Its partisans have set themselves up as teachers of the human race. Liberty of thought is their watchword; and that watchword they have made resound from one extremity of Europe to the other. With one hand they have striven to shake the throne; and with the other to overthrow the altar. Their object is to extinguish faith, and to turn the thoughts of the people into another channel with respect to religious and civil institutions; and the revolution has, so to speak, been effected; its proselytes have increased in number; their maxims are everywhere spread abroad; kingdoms have found their ancient foundations shaken; and nations, thunderstruck to

find their principles annihilated, have demanded by what fatality they were become so different from their former selves. Those who were naturally the best fitted to enlighten their contemporaries have placed themselves at the head of the unbelievers; they have displayed the standard of revolt; and, by that spirit of independence, they have striven to add to their fame. A cloud of obscure writers, unable to distinguish themselves by the lustre of their talents, have shown the same audacity. . . . Finally, religion to-day counts almost as many declared enemies, as literature boasts to have produced pretended philosophers. And Government ought to tremble to tolerate in its bosom a sect burning with zeal, which seeks only to raise the people to rebellion under pretext of enlightening them." The discourse then proceeds to criticise a number of works whose taste and morality have long since been generally condemned; and the eloquent orator thus sums up—"By combining all these productions we might form a body of false doctrine, the whole of which incontestably proves that the object proposed is not merely to destroy the Christian religion. Impiety does not limit its projects of innovation to a rule over people's minds. Its restless enterprising genius, the enemy of all subordination, aspires to overthrow every political constitution; and its aspirations will be fulfilled only when it shall have placed the legislative and executive power in the hands of the multitude; when it shall have destroyed the necessary inequality of ranks and conditions; when it shall have vilified the majesty of kings, and rendered their authority precarious and subordinate to the caprices of a blind multitude; and when, at last, by means of these strange revolutions, it shall have precipitated the whole world into anarchy and into all the evils which are inseparable from it." To us it seems that that wise and warning voice, unheard or unheeded a century ago, deserves to be listened to now, when the same levelling spirit, the same impatience of all subordination, are pushing us on to an unmixed democracy, of all Governments the most corrupt and unnatural.

Several members of the French Bar took a leading part in the famous process against the Jesuits which was brought before the Parliament of Paris in 1761, and which resulted in the suppression of the order in France in 1764. Gerbier, Target, and Legouvé wrote or pleaded against the Jesuits, but Target gave them their deathblow by procuring a copy of their constitutions printed at Prague in 1757, which, among other things, showed the supreme autho-

rity of the General and the obligation of all the members to obey him *perinde ac cadaver*. A summary of the constitutions and of everything that related to the history of the order was likewise laid before the Parliament by M. Joly de Fleury—a work of immense labour and erudition, an inexhaustible armoury from which the adversaries of the Jesuits may always furnish themselves with the keenest weapons. There was much that was objectionable and immoral in the history and constitutions of the order; but it was the omnipotence of the General that chiefly weighed with the Parliament, as that was clearly dangerous to the liberties of the Gallican Church which it had always strenuously maintained.

Scarcely had the protracted conflict arising from the bull *Unigenitus* been terminated, when Parliament and the Bar found themselves involved in a fresh struggle with the royal authority, arising out of questions connected with the conduct of the Duke d'Aiguillon, who was accused of numerous acts of maladministration while Governor of Brittany. The Parliament instituted a process against him, but the King interfered and forbade the Parliament to meddle with the matter. Thereupon, that Court registered the royal edict, but immediately afterwards drew up an energetic remonstrance, and followed it up by suspending the exercise of their functions. This produced a strong measure on the part of the King and his Chancellor, Maupeou, who were bent upon breaking the resistance of Parliament at all hazards. On the night of the 19th or 20th Jan., 1771, all the members of that body were awakened at the same hour in the King's name. Two musquèteers entered their chambers and presented to each of them a paper bearing an order to resume their functions, and to answer immediately in writing "yes" or "no." Astonished at the suddenness and violence of the measure, forty members signed "yes;" the majority, more firm, signed "no." But next morning, when they had all met together, those who had complied with the royal command were ashamed of their weakness, and hastened to retract it and join their colleagues in their resistance at all hazards. The following night a similar scene took place. Each member was awakened by an usher who notified to him a decree of Council confiscating his office, and forbidding him to resume his functions or even to take the title of member of Parliament; and scarcely had the usher gone out when musqueteers entered bearing letters of exile banishing the members to different parts

of the kingdom. The Chancellor Maupeou hoped by this vigorous measure to strike terror into Parliament, and at least compel a fraction of its members to become the submissive instruments of the royal will. But he was mistaken in his calculations. Not a single member showed either hesitation or weakness. All nobly adhered to what they believed to be their duty. It was an act of civil courage of which history has hitherto taken too little note. The ancient Parliament was thus suppressed and was speedily replaced by a miserable substitute which became a public jest, and was christened the Parliament Maupeou, after the unpopular Chancellor who had called it into being. At the time of its suppression, the Parliament had against it the King, the Court, the free thinkers, and the Jesuits—redoubtable adversaries. In its favour it had a long list of services rendered, and the honourable character of its members, many of whom were distinguished by probity, learning, and disinterestedness. But it had also strong prejudices. It had especially deteriorated since the legalising the sale of offices had put an end to the principle of elections. It wanted the initiative to enable it to revise the ancient laws, and royalty would have stopped it on that path of improvement even if it had ventured to enter upon it. On many occasions it felt thoroughly that it had need of support, and it had several times recommended the assembling of the states-general; but royalty, which feared them, was united on this point with the clergy and the nobility, and rejected the proposal. Thus abuses were perpetuated, financial difficulties increased, and things had come to such a point that a revolution was almost inevitable.

The Bar remained faithful to the old Parliament, and 544 advocates on the list at the time of its suppression, voluntarily gave up the exercise of their functions. A new order of pleaders was established, consisting of 100 lawyers, termed *avocats procureurs*, to manage causes before the Maupeou Parliament, their fees being paid by a tariff—a degradation to which the former Bar had always refused to submit. These substitutes, however, were never regarded by the judges or the public as true advocates; and the Chancellor made pressing overtures to Gerbier, the head of the old Bar, to resume his functions, which he did and induced 262 advocates to resume theirs at the same time. We have already mentioned how strongly this conduct of Gerbier's was resented by the majority of the order, who still refused to acknowledge the Maupeou Parliament. But the organization of the Bar was, for

the time, entirely broken, and no list of advocates was made up from 1770 to 1774, nor was any batonnier appointed. The triumph of Maupeou was for the time complete. His new parliament was comparatively ductile and submissive, and the return of Gerbier and a large section of the Bar allowed the course of practice to proceed smoothly and respectably. But that triumph was short lived. Louis the 15th terminated his scandalous, selfish, and vicious career on 14th May, 1774, and the young prince, Louis the 16th, succeeded him. On ascending the throne, he made laudable efforts to put an end to the most crying abuses, abolished the torture and compulsory labour, called the sage Turgot to his counsels, and restored the ancient Parliament. But Maupeou had dealt it a death-blow, and it was only a shadow of the former body that assembled. It had lost its influence and its moral life. The Bar, as they had shared in the disgrace, shared in the triumph of the ancient parliament, was restored to all its former privileges and functions, and was addressed in the handsomest and most flattering terms by the chief officers of the Crown. The restored Parliament proved to be little more submissive to the royal authority of Louis the 16th than it had been to that of his predecessor. Again and again, it set itself against his measures of reform; and from Nov. 1774 to May 1776, the king found himself constantly opposed and thwarted by his Parliament. Among the last great causes tried before the ancient Parliament, was that of Solar, in which Elie de Beaumont and Tronson-Ducoudray, particularly distinguished themselves by their eloquent and successful advocacy of the innocent and ill-used Cazeaux; that of the necklace which has acquired a European fame from the great names of those implicated in it; and that of Kornemann the banker of Strasbourg which was illustrated by the debut of a young advocate named Bonnet, who was destined to become one of the chief glories of the Bar.

The restored Parliament continued its opposition to the king and refused to register his financial edicts; and at the meeting of 30th July 1787, we find it laid down in an address to the king that "The nation, represented by the States-General, has alone the right to grant to the king the necessary supplies," and the king is further requested to summon the States-General. On 6th August 1787, the king held a *lit de justice* at Versailles, in which he first vainly sought to vanquish the resistance of Parliament, and afterwards ordered the registration of his edicts. Next day,

the Parliament answered by declaring "null and illegal the transcription of the edicts ordered in the *lit de justice*." It was the first act of the revolution. M. Gaudry, in his history of the Bar, thinks that the real motive that influenced the members of Parliament, in their opposition to the financial edicts of the king, was not patriotism, but a selfish fear of being subjected to the burden of the land-tax. That, and their wish to keep the king in tutelage, were, according to him, the real motives of their obstinate hostility. "As to the advocates," he says, "their position was entirely different; the projects of reform were welcomed by them with a real enthusiasm; far from threatening their influence they seemed likely to augment it by freeing justice from her fetters and giving up to them the discussion of public affairs." Agitations and troubles continued, and the language of Parliament became more menacing and unmeasured. On the 12th April 1788, on the subject of *lettres de cachet*, we find observations addressed to the king commencing in the following terms, "Public liberty attacked at its foundation, despotism substituted for the law of the state, the magistracy at length reduced to be only the instrument of arbitrary power, such are the great and lamentable causes which bring Parliament to the foot of the throne."

On the 24th Jan. 1789, the States-General were summoned to meet at Versailles, and were actually opened on the 5th of May following. On the 17th June, they assumed the title of Constituent National Assembly, and speedily arrogated to themselves all the powers of the state. They lost no time in suppressing the ancient Parliament, whose last sitting was held on the 14th Oct. 1790, and which fell after an existence of 472 years, reckoning from 1318 when it was made stationary by Philip the Long. As a judicial tribunal, it had fulfilled its duties for the most part well and nobly; as a political body, it had proved a failure; strong with the feeble and feeble with the strong, mistaking its constitution and striving to make itself as far as possible a guide and tutor of kings. From the earliest years of Louis the 15th, it unceasingly strove to substitute its aristocratic power for that of the monarchy. It ruined the hold of the throne upon the affections of the people by its constant attacks, and the aristocracy by conniving at the imprudence and excesses which shocked all impartial men; it paralyzed the measures initiated by Louis the 16th which might have saved the state, and ended by falling a victim to its own insensate pride, and involving in its downfall the monarchy itself. The Bar, for centuries the firm ally and the chief ornament

of Parliament, did not long survive it. The Constituent Assembly, indeed, numbered among its members several advocates belonging to the Parisian Bar, and it was presided over by Thouret an advocate of Rouen; but the advocates of the ancient Parliament felt it impossible to form the Bar of the new judicial organization. The dominant passion for equality was also strongly against the privileges of the Bar; and the Assembly, after having abolished several privileged corporations, proceeded also to abolish the Bar. The resolution putting an end to it was passed upon the report of an advocate of Lyon named Bergasse, who had previously acquired considerable reputation at the Bar. His report of 17th August 1789 concludes in the following terms, "Every one shall have the right of pleading his own cause himself if he thinks proper, and in order that the office of advocate may be as free as it ought to be, advocates shall cease to form a corporation or an order, and every citizen having made the necessary studies and submitted to the necessary examinations, shall have the right to exercise that profession: he shall be bound to answer for his conduct only to the law." Strange to say, none of the advocates in the Constituent Assembly stood up in defence of the Bar, and the laws of 16th August and 2d September 1790 abolished the order of Advocates. One orator only defended them in the Assembly, and that orator was Robespierre; and with his true and prophetic, as well as eloquent words, we close the present article. "The Bar," he said, "seems still to display liberty exiled from the rest of the world; it is there that we still find the courage of truth, which dares to proclaim the rights of the weak and oppressed against the enemies of the powerful oppressor. The exclusive power of defending citizens shall be conferred by three judges and by three lawyers! In that case you will no longer behold in the sanctuary of justice those men of deep feeling capable of rising to enthusiasm in behalf of the cause of the unfortunate, those independent and eloquent men, the support of innocence and the scourge of crime. They will be repelled, but you will have welcomed lawyers without delicacy, without enthusiasm for their duties, and only urged on in a noble career by sordid considerations of interest. You mistake, you degrade functions precious to humanity, essential to the progress of public order; you close that school of civic virtues where talent and merit learned, while pleading the cause of citizens before the judge, to defend thereafter that of the people in the legislative assemblies."

NOTES IN THE INNER HOUSE.

The Patrimonial Consequences of Divorce.

Johnstone Beattie v. *Johnstone.*

The important principle, that when marriage is dissolved by divorce, "the party injurer (as Lord Stair puts it) loseth all benefit accruing through the marriage, but the party injured hath the same benefit as by the other's natural death," received illustration, though it can hardly be said extension, by the judgment in this case. The question argued was whether the rule admittedly applicable to legal provisions and to conventional provisions made by the spouses for one another, extended to a provision made in an antenuptial contract by the father of the guilty husband, in the form of an annuity payable by him during his life to his son, whom failing to the wife, whom failing to the children of the marriage. The argument chiefly relied upon by the defender (the father-in-law of the pursuer), was, that the provision was an alimentary provision made by him for his son, and that if he had to pay it to the pursuer he might be called upon to fulfil in addition his natural obligation to aliment his son, notwithstanding that he had already implemented it by the annuity settled by the marriage contract. But the assignees of the son, who was not prohibited from assigning, and who had actually assigned his interest in the provision, were exposed to that argument just as much as the pursuer; and it was clearly no answer to them or to his creditors attaching the annuity that the father might by their act be made liable to a double obligation. The defender, as Lord Deas said, must be presumed to have had the natural obligation as well as the legal consequences of divorce before his eyes when he signed the marriage-contract, and the assignees of the son took their right subject to the conditions imposed by the contract and by the law. The opposite view, which, however, was that of both the Sheriffs and of Lord Curriehill, would have the startling result of making the guilty husband better off in consequence of his crime, because he would get to his own exclusive use what was intended for the support of both spouses. This is the reasoning of Craig as to terce: "Neque enim ratio permittit, ut ex matrimonio illo contra quod peccavit mulier commodum accipiat; frustra enim legis

beneficium implorat qui in legem peccat."—(*Jus. Feud.* ii. 2, 35, cf. § 36.)

The only untoward result to which the principle given effect to appears to point is, as Professor Bell points out in reference to another case, "that the creditors may be exposed to injury by collusive proceedings for divorce, with a view of conferring on the wife during the husband's life what she otherwise could not have insisted in against the creditors of her husband."—(*Com.* i. 634; *ed. Shaw* 681.) There was certainly no collusion in the present case; but it suggests, even more strongly than the case referred to by Mr. Bell, the possibility of collusion for that purpose. Here the wife takes the funds out of the very hands of the divorced husband's creditors. Mr. Bell observes that there seems no way of escaping from this unhappy consequence. But on the other hand, the law takes strict precautions against collusion in every action of divorce, and every decree must be presumed to have been honestly obtained; while even a few miscarriages of this kind cannot be set against what is undoubtedly a wholesome, as it is a time-honoured principle.

Some expressions have been used which might seem to make the rule originate in an extensive construction of the words of the Act 1573 as to divorce for desertion; but in principle at least it is really derived from the Roman law. A generation before that statute Balfour records the case of *Janet Auchenleck contra James Stewart*, 18th Dec. 1540, as deciding that "Quhen ony man and his wife ar simpliciter partit and divorcit be the authority of the Judge Ordinar for adulterie or ony uther trespas committit be the man, the haill tochergude, and all that was resavit be the man fra the woman be virtue of the matrimonie contractit betwix thame, aucht to be restorit to the woman, with the proffeittis thairof, efter the geving of the sentence of divorce betwix thame."—(*Practicks*, p. 99; and comp. *Fraser P. & D. Rel.* i., 653, 691.) This was the more remarkable, because at that date there was no divorce *a vinculo*, but the mere separation was followed by the same consequences which flowed from the perfect divorce of the civil and of the later Protestant law. There can be no doubt that even in regard to the special case of an annuity provided by the husband's father, the case we have been considering involves no novelty, as that appears from the session papers to have been the very *species facti* of the case of *Justice* v. *Murray*, Jan. 13, 1761, M. 334, where the wife was *assumed* to get such an annuity.

The decision in the present case will suggest to the prudent conveyancer the propriety of inserting a clause in marriage-contracts, to guard against the contingency of either of the spouses obtaining a decree of divorce against the other, and to regulate the rights of parties in that event. Formerly clauses were inserted in marriage-contracts to provide against the premature dissolution of the marriage by the death of either spouse within a year and a day without a living child; and such clauses were given effect to by the Court, and often proved advantageous. It may appear somewhat indelicate and unseemly to prepare by anticipation against a violation of the marriage vow; conveyancers may hesitate to ask those whom Lord Kinloch, in his interlocutor, calls "rapturous lovers," and especially to ask a young and trusting bride, to read over and sign a deed referring in plain terms to such a subject. But where interests of such importance are concerned feelings of delicacy must give way. The contracting spouses and their parents confide in their lawyers to protect them and the children of the marriage, so far as possible, against the evils and misfortunes incident to marriage, and among these against the contingency of adultery and divorce. We cannot but think that this decision reminds conveyancers that very important and unexpected results may sometimes be effected by the law, where they have neglected to regulate the patrimonial interests of parties in the event of the dissolution of the marriage otherwise than by death.

Liability of a Master for the Fault of a Foreman and Manager.

Wilson v. *Sneddons.*

This case is now of somewhat old date (May 25, 1866, reported 4 Macph. 736), but it touches upon and illustrates a subject of such interest, and, taken in connection with recent English cases, it raises so clearly the question whether there is a serious divergence of the laws of England and Scotland on that subject, that we are induced to go somewhat out of our usual course in order to consider it. It was an action of damages against the proprietors or lessees of a coal-pit, in which the husband of the pursuer was killed by the breaking of a rope used for raising and lowering the workmen. The question was, whether the defect or insufficiency of the rope was due to the fault of the defenders

or some person for whom they were responsible. It appeared that a sufficiently good rope had been provided by the defenders, and was in use till the day before the accident. It also appeared that there was more of that rope at the pit office. But on the day before the accident the rope in use was found to be too short, and by the authority of Gemmell, the defenders' underground manager or oversman, a rope of a different kind was substituted, which, being insufficient and defective, caused the accident. A verdict having been returned for the pursuer, the defenders excepted to the directions of Lord Jerviswoode, and also moved for a new trial. The question came to be, whether the defenders were liable to the pursuer for the fault of Gemmell: and as the judges of the Second Division ultimately viewed it, whether there was evidence to show that, in doing the act or committing the fault ascribed to him, Gemmell was acting within the scope of his authority as oversman or underground manager. They held that there was not satisfactory evidence on this point, that it was impossible to make out from the evidence on what ground of fact the jury proceeded in arriving at their verdict for the pursuer, and therefore granted a new trial.

The first exception was to the presiding judge's refusal to direct the jury that, if they "were satisfied on the evidence that the defenders used reasonable care in the appointment of Gemmell as oversman, and provided for his use a sufficient rope for the operation in question, then the defenders are not in law answerable for the personal fault of Gemmell in using a defective or insufficient rope not belonging to them." This seems to touch very closely the question which has frequently been asked: "Is a foreman a fellow-servant?" That is to say, is he a fellow-servant in the sense of the rule established for both England and Scotland by the *Bartonshill Cases*, according to which a workman engaged in a common employment undertakes the risk of the negligence or fault of his fellow-workman and has no remedy against the common employer for injury so arising. The opinions and the decision of the Court, giving a new trial, assume that the question is to be answered in the negative, and that if Gemmell had been acting within the scope of his authority as foreman, the defenders would have been liable for his fault. The Lord Justice-Clerk (Inglis) said:—

"Whether the defender is to be made answerable for the fault of Gemmell, assuming Gemmell's fault to be distinctly proved, depends upon the

separate question, whether the fault of Gemmell was a fault which he committed in his representative capacity as performing a duty delegated to him by the master, and representing the master in the performance of that duty, or whether the fault was committed by him in the doing or omitting of something which was not within the scope of the authority delegated to him. If the former, it may well be contended in point of law that the master is answerable, because in that case he is truly himself performing through Gemmell a duty which he owes to his workmen, but in the latter view the mere circumstance of Gemmell being underground manager, and therefore representing and binding the master in those things that are delegated to him, will not put him in the position of binding the master in things that are not delegated to him, and are not within his authority."

The same distinction was made and acted upon in *Wright* v. *Roxburgh and Morris*, Feb. 26, 1864, 2 Macph. 748, 755, in which case the accident for which reparation was asked had certainly been caused by "the individual act" of Morris the underground manager of the mine, in performing an operation on the ventilation of the mine, and the master was assoilzied on the ground that in that operation Morris was "neither the superior of the persons who were killed, nor were they acting under his order, nor had they any direct connection with the operation which he was performing." In two earlier cases also Lord President M'Neill pointed out that the argument as to the responsibility of a master to a servant for the fault of a foreman may depend on the foreman's "precise position," and "on the particular charge he had in the business." *Scott* v. *Craig*, March 14, 1862, 24 D. 789; *M'Millan* v. *M'Millan*, June 13, 1861, 23 D 1082.

These cases, especially the case of Wilson *v.* Sneddons, adopt, with additional refinements, the view of Lord President M'Neill in *Somerville* v. *Gray*, March 31, 1863, 1 Macph. 768, where, in an elaborate judgment he reviewed the decisions on the doctrine of *collaborateur*, and maintained (1) that the House of Lords had never gone so far as to hold that "in short, an employer is not responsible at all if he has a manager to whom he delegates his own powers and authority," and (2) that an underground manager entrusted with the duty of taking precautions for the safety of workmen was not a "fellow-labourer." That case, however, was not the first in Scotland which distinguished a foreman or superintendent from other servants acting under the same master. Mr Smith, in his valuable work *On Reparation* (p. 154), lays down the rule broadly, and refers to various cases in support of it, of

which it is enough to mention *M'Auley* v. *Brownlie*, March 9, 1860, 22 D. 975. We also note the cases not mentioned by Mr Smith of *Finnigan* v. *Peters*, Jan. 11, 1861, 23 D. 260; *Darby* v. *Duncan & Co*, Feb. 9, 1861, 23 D. 529; *M'Millan* v. *M'Millan*, June 13, 1861, 23 D. 1082. Nay, it may even be said that the germs of the rule are to be found in the opinions of the Lord President M'Neill and Lord Ivory in *Gray* v. *Brassey*, Dec. 1, 1852, 15 D. 135, long before the Bartonshill cases. Comp. *Paterson* v. *Wallace*, 1 Macq. 748, and note of Lord Ardmillan in *Liability of a Master for the Fault of a Foreman and Manager*. *M'Naughton* v. *Cal. Rail. Co.*, 19 D. 271. We cannot read the judgments of Lord Colonsay on this subject (even where, as in the present instance, we are inclined to doubt their tendency,) without thinking that those are mistaken who refuse to allow him a high place as a lawyer. If he did not fully enunciate the principles afterwards laid down in the Court of last resort in the *Bartonshill Cases*, he entirely avoided the extreme views thrown out by Hope, J. C., and Lord Cockburn, in the other Division, in *Rankin* and *Dixon*, Jan. 31, 1852, 14 D. 420, and afterwards overruled, and he said and decided nothing inconsistent with the correct doctrine subsequently established. He all along had a clear apprehension of the truth that the chief difficulty in all such cases is to determine what is common employment. He has contributed much to solve that problem. He is also the chief author of the rule now fixed in the law of Scotland as interpreted by the Court of Session, that a deputy-master or general superintendent is not a fellow-servant, and we cannot but think that, apart from the adventitious support which that proposition may derive from his presence in the Court of Appeal, his authority raises perhaps the strongest presumption in favour of its soundness.

It is thus abundantly clear that the Court of Session is now committed to the doctrine, that a foreman whose powers amount to those of a general superintendent is not, within the scope of these powers, a fellow-labourer of the workmen employed under him, but a representative of the master, who is liable for his faults. It is also clear that this exception must be taken subject to some limitations. Not every "foreman" will fix the master with liability for his negligence, but only one whose powers amount to a large and general superintendence involving a representation of the master. This is no doubt somewhat vague, but

definition can only, it would appear, be obtained by further litigation. Again, on the principle of the case now under consideration, even such a foreman will be a "fellow-workman," where he is guilty of negligence in doing something outwith the sphere of duty committed to him, as where he performs himself some piece of work which he might have ordered a workman to do. This is perfectly in accordance with well recognized principles. See *Guthrie Smith on Reparation*, pp. 143-150.

The general question as to a foreman has not been raised in England so often, or argued so pertinaciously as in Scotland. The case of *Wigmore* v. *Jay*, 5 Ex. 354, 19 L. J. Ex. 300, is generally cited as an authority for holding that a foreman is a fellow-servant of those whose work he superintends; but the question does not seem to have been argued, and the report does not show what the precise position of the foreman in that case was. In *Gallagher* v. *Piper*, 16 C.B., N.S. 669, 33 L.J., C.P. 329, Mr Justice Willes said that "a foreman is a fellow-servant as much as the servants whose work he superintends," and that he was "unable to draw a distinction so long as the party injured and the party who has caused the injury have a common master." He would have "considered the question if it had been the case of one possessing universal authority to act for the master in the matter."

Lord Chief Justice Erle said—"The only matter on which I could pause was, whether Phear (the foreman) was such a general manager as to stand entirely in the place of the defendants, the master builders, so that what was said to Phear would be in contemplation of law said to them; for if that could be sustained, this action would be maintainable." On the evidence, however, his lordship held that no fault had been brought home to the defendants either in the selection of Phear, or in failing to supply a sufficient quantity of materials for the scaffolding (which Phear ought to have used.) Mr Justice Byles differed from the rest of the Court in the result arrived at, holding Phear to be a general agent and manager of the defendants, for whose acts they were liable to the servants under him. "Phear," he said, "was such an agent or employé that notice to him and misconduct in him was notice to his employers and misconduct of the defenders." It appeared that Phear had had the entire management of extensive contracts of the defenders at different places, engaging and dismissing servants, and having foremen under him; so that, accord-

ing to this case, it is very difficult to conceive what kind of a superintendent would have powers sufficiently large to fix the master with liability for his fault.

The case of *Hall v. Johnson*, 34 L. J. Ex. 222, may be stated as being nearly to the same effect. There, in the Exchequer Chamber, Chief Justice Erle expressly reserved the opinion of the Court as to the case of a "deputy master;" but it was decided that an "underlooker" in a mine is not in that position.

The very recent case of *Feltham v. England*, 36 L. J. Q. B. 14, 2 Law Rep., Q. B., seems at first sight to negative the doctrine of the Scotch Courts entirely, as well as that which was reserved by the Court in *Gallagher v. Piper* and *Hall v. Johnson*. The following is the most material passage from the judgment of the Court of Queen's Bench, delivered by Mr Justice Mellor:—

"We think that the foreman or manager was not in the sense contended for the representative of the master. The master still retained the control of the establishment, and there was nothing to shew that the manager or foreman was other than a fellow-servant of the plaintiff, although he was a servant having greater authority. As was said by Mr Justice Willes in *Gallagher* v. *Piper*, "A foreman is a servant as much as the other servants whose work he superintends." There was nothing in the present case to shew that he was an incompetent or improper person to be employed as foreman or manager. We are unable to distinguish the case on this point from those of *Wigmore* v. *Jay*, *Gallagher* v. *Piper*, and *Skip* v. *the Eastern Counties Railway Company*. We think that this case ranges itself with a great number of cases, by which it must be considered as conclusively settled that one fellow-servant cannot recover for injuries sustained in their common employment by the negligence of a fellow-servant, unless such fellow-servant is shown to be either an unfit or improper person to have been employed for the purpose—*Morgan* v. *the Vale of Neath Railway Company*. And this rule is not altered by the fact that the servant to whom the negligence was imputed was a servant of superior authority, whose lawful directions the plaintiff was bound to obey. It is difficult in the present case to discover any evidence that the foreman was guilty of any negligence; but it is not necessary to determine that, inasmuch as the conclusion at which we have arrived renders it unnecessary to do so."

This, however, may be read, perhaps, in connection with the previous cases, as *assuming* the distinction between an ordinary "foreman" and a "deputy master," and reserving the question of the master's liability to his other servants for the negligence of the latter.

The tendency of the English cases is to narrow to the utmost the class of superior servants or "deputy masters" for whose negligence the master may be liable to the workmen in his em-

ployment, and to deny that liability entirely in the case of an ordinary foreman. In this respect the case of *Somerville v. Gray* appears to be in direct opposition to that of *Hall v. Johnson*. The Scotch judges, on the other hand, have been inclined to hold the master answerable for the faults of all foremen, qualifying the rule in practice by requiring very distinct evidence of that act or omission on which the action is founded has taken place within the scope of the duties of foreman.

We submit that the whole law on this subject may be shortly stated in the following propositions: that the whole duty of the master to the servant consists (1) in furnishing proper superintendence; (2) in supplying good materials and machinery; and (3) in employing only duly qualified workmen. The first branch of this proposition might perhaps be included in the third, but for our present purpose it is more convenient to separate them. When all these duties are fulfilled, the servant has no claim. Thus, when the master superintends the work personally, and employs a good foreman, he can do no more; but if he never looks near the work himself, and employs a manager or deputy, then the fault of the deputy is the fault of the master himself.

Correspondence.

SHERIFF COURT REFORMS.

[We have been favoured with the following letter, addressed by a gentleman of much experience to an influential lawyer in Edinburgh.]

22d February 1867.

I SPOKE to you some time ago about one or two points in which I thought the Sheriff Small Debt Court might be improved; and as some reform seems determined upon during this Session of Parliament, I lose no time in putting these suggestions, as you wished, in writing for your farther consideration. I am not one of those who think that such rapid procedure and "snap shot decisions," as the late Sheriff Cay used to call them, ought to be carried to any great extent. To apply the principle to questions involving value towards £50, seems to me to go far enough, if not too far. Litigants with interests to that amount can well afford to pay a little for the more solemn and more maturely considered settlement of their disputes. The proposal of the Lord Advocate, however, seems safe in this view, that where no appearance is made in cases to that extent, decree in absence will pass speedily, and will cost only a few shillings instead of £3 or £4 as now, and that where a defender does appear, the action will, in nine cases out of ten, be remitted to the Ordinary Court Roll, to be proceeded with there more deliberately. At present, parties seldom choose to trust to the comparatively short and inexpensive mode of proceeding in the Ordinary Court, which we now possess, but in the great majority of cases where any defence is stated, it is thought

necessary to have a regular record by Condescendence and Defences. As far as decrees in absence are concerned, and these include the greater number of all the decrees both in the Small Debt and Ordinary Court, the small debt summons might be used for actions to any amount, provided the shortly required statement of the case in the summons could be made sufficiently intelligible, so as to let the other party know what the demand upon him really is. There would be little danger, I think, in allowing all questions of the kind now usual in the Small Debt Court, to be brought there up to the value of £25, under the rules and forms of that Court as it at present stands. All claims up to that amount are confined to the Sheriff Courts. They do not seem to admit of any great amount of expense in litigation, and the parties concerned in them can often ill afford it,—and of such smaller cases an early and final settlement is generally particularly desirable. The Small Debt Court is certainly best suited for dealing with book debts, and other simpler contract debts, but there seems no good reason why other kinds of claims to that small amount, which are constantly arising, should be excluded from the same inexpensive and expeditious method of treatment and termination. Claims of all kinds are now frequently restricted to £12, in order to gain this advantage, at some sacrifice; and, as a striking example, on the other hand, I may mention a case decided the other day in the Ordinary Court, in which the amount sued for was £13, and the expenses found due in the end were no less than £28.

It would also be an improvement, I think, in the general form of process in the Small Debt Court, if some short form of defence could be served upon the pursuer before the first diet of compearance, as now when a counter account is pleaded. The pursuer would then have earlier notice of what farther steps he had to take in his own behalf, and what witnesses he had to bring. Some such form, it is believed, has been adopted in the English County Court procedure, and found to work well.*

It would also be an improvement if considerable latitude and discretion were given to the Court, to allow amendments in all parts of the procedure in small debt cases, where omissions or mistakes have been inadvertently committed, and to make such order thereanent as the justice of the case may require, so as to bring the real parties, and the real question at issue, at once before the Court. The character in which the pursuer or the defender should appear, and even their names or right designations are sometimes mistaken, or not easily ascertained; defects are occasionally observed in the stating of the claim, and other and better conclusions, it is sometimes perceived, might have been added, all which might often be easily amended without injustice to either party. Considerable liberty is even now taken in such matters, but it often happens that the case must be dismissed, and the party put to the trouble and expense of another action. It seems rather the tendency of the present practice and legislation to permit the rectification of all such unintentional errors.

It would often be of much benefit to working people if it were made competent in actions for payment of wages, or for enforcing the other obligations of the contract of hiring and service, to cite a mining or other company, whether known by descriptive name or otherwise, at any of its places of business, and without the necessity of calling any of the partners, who generally live elsewhere, nd often in different counties. The calling of the resident manager of the company within the district might even be made sufficient.

There is one class of cases of very frequent occurrence in the Sheriff Court, which I have long wished to see despatched in a more summary manner than that usually followed, and which might, without much risk of wrong decision, be transferred to the Small Debt Court, or have some similar form of procedure appointed for them. I allude to affiliation cases. The parties in these are, for the most part, on both sides poor country people, who have nothing to spare for

* It is so where the defendant relies on a set off, infancy, coverture, a statute of limitations, or a discharge under a Bankrupt or Insolvent Act. 9 and 10 Vict., c. 95, s. 76.—(Ed. J. J.)

law expenses. But at present, if the case is contested, which too often happens for the sake of staving off the evil day, or because the defender thinks the pursuer will find it difficult to prove her case in the face of his denial,—then after a delay of many months, perhaps years, one or other, or both of the parties, are saddled with a heavy load of law expenses. Thus, even if the pursuer gains her case, she is often not much the better of it, for the defendant having to pay to her agent, in the first place, £15 or £20 of expenses, is utterly unable to give her anything for his child. These heavy charges, moreover, not unfrequently induce him to leave the country entirely, in order to get rid both of them and of the burden of the child. This is not an unfrequent termination of a long litigation, even where both parties have, in the meantime, paid to their agents considerable sums to induce them to go on. Under the present law, such cases are brought in the Small Debt Court where the paternity is admitted, but the mother sues for past due aliment and inlying expenses, as well as when the paternity is denied, but the child is dead, and the whole claim is less than £12. Where the child is alive, and the alleged father denies it to be his, the action is thought incompetent in the Small Debt Court, on the ground that it really involves a question of £50 or £60 in value, though the sum immediately at issue may be very small. Almost the only difficulty that arises in such cases, now that the oath in supplement is superseded, is upon the construction of contradictory evidence. But this occurs in many other questions already within the small debt jurisdiction. Perhaps fewer cases would be contested if the defender knew that the remedy against him was more easy and speedy. Many cases are even now arranged between the parties in that Court, for the pursuer very often sounds the real intentions of the defender by first bringing her action there, and, only upon his determined denial, carrying it into the Ordinary Court. The extension of the small debt jurisdiction to £50 would bring most affiliation cases into that Court, provided the extension be not confined to claims falling under the Triennial Prescription Act. Where a higher aliment is demanded, parties might be left to try the issue in the more expensive Court. I don't think that too great facility in bringing such actions into Court is to be much dreaded. I have never known of a case being brought against a man without there having been some grounds for it, though the pursuer may have failed from the natural difficulty of the proof in such cases.

Another improvement in the same direction might be made for the benefit of smaller proprietors, namely, the extension of summary removals, under 1st and 2d Vict., cap. 119, sect. 8, to leases of houses and other heritable subjects for twelve months, and the putting of these on the same footing as other causes under the Small Debt Act. At present these are confined to such lettings under twelve months, though for rents up to £30. Now any sort of lease for so short a time is uncommon. Monthly lettings of small holdings sometimes occur, and have occasionally had the benefit of the Act; but, so far as this county is concerned, the Act has been used only for getting rid of workmen who have left their work, but have retained possession of houses belonging to the proprietors of the works. It would be a boon, I think, to extend it as I have suggested. I have known many cases where an obstinate yearly tenant, in a small tenement, has defied his landlord for months, and put him and the incoming tenant to great inconvenience, upon some plausible defence in the Ordinary Court in which the action for his removal had to be brought. Even under the summary form, as presently arranged, the removing does not cost a defeated party less than 30s. or 40s. Perhaps, if the action was brought more under the Small Debt Act, the expense would be greatly less. That jurisdiction might be made to apply where the rent is £25 and under, and the subjects are let for one year and under. Such a summons to remove might be held a good warning if brought forty days, or some short time, before the agreed on term of removal.

It would perhaps be well to allow the Sheriff from time to time to appoint other days than the Ordinary Court days for hearing and taking proof in adjourned cases. This might be of use for Circuit Court cases, if not so much for those in the Ordinary head Small Debt Court.

Appeals from the Small Debt Court should be admitted, I think, with some reserve and caution. I am perfectly aware of the advantage to the public of this right of appeal, and of the unspeakable relief to him who decides in the first instance, but in innumerable cases it is sure to add to the delay and expense. The richer man will always appeal while the poor man will not be able. It will be often done for delay alone, and such appeals will come before the Sheriff only four times a year. I would not object to such appeals in actions involving sums from £25 to £50, upon a case from the Sheriff-substitute, upon the facts or the law, or his notes on the matter, comprehending both. But for cases under £25 the judgment of the Sheriff-substitute or local Judge should, it is thought, suffice. The matter should take end there. The losing party may grumble for a time, but he will become reconciled at last, when he finds that no more of his time and money is required in pursuing or defending the case, and that his troubles and anxieties in the matter are over. Nor will he likely have suffered any injustice, for if a little time is taken for consideration before coming to a decision in the more intricate cases, that decision will seldom be far wrong, though pronounced by an inferior Judge.

RETIRING ALLOWANCE OF SHERIFF SUBSTITUTES.

(To the Editor of the Journal of Jurisprudence.)

SIR,—I wrote to you on a former occasion, as to the unsatisfactory footing on which, as it appeared to me, the retiring allowances to us Sheriff-Substitutes were placed by the Act 1 & 2 Victoria, cap. 119, § 6—and requesting you to notice the matter in the *Journal* when a suitable opportunity should occur. Such an opportunity seems likely to arise from the large measure which the Lord Advocate is about to introduce for the extension of our Small Debt jurisdiction, and many alterations in our forms of proceeding, and should you concur in my views on the subject, I trust you will advocate them in such manner as you think best. Looking at the words of the statute—"old age or permanent inability"—to be proved to the satisfaction of the heads of Court and the Lord Advocate for the time being, they appear to me so indefinite that no proof could satisfactorily meet them, whereas if *old* age were defined. and that alone, or length of service alone, made the ground of our claim, irrespective of all questions as to health or ability, nothing could be easier. If the statute is to be rigidly interpreted. no man can get the allowance unless he is on death-bed, and if he *will* retire sooner he has no claim to it whatever. Now considering the reason for granting such allowances, namely, that we should abandon every other source of emolument, this would seem a very harsh result;—not to mention the injury to the public service, by inducing men to hold on after their faculties were comparatively impaired. This view seems confirmed by the provision in the statutes for such allowances to the Judges of the Supreme Court both in England and Scotland by which they are entitled to claim their pensions, after fifteen years service and the same rule, viz., this length of service, is applied to all officers in the Civil Service—the only exception being the County Court Judges in England, to whom the same rule applies as to us, but *they* are neither bound to residence, nor are they debarred from other employment.—Yours faithfully,

A SHERIFF SUBSTITUTE.

12th February, 1867.

The Month.

INSTALLATION OF LORD PRESIDENT INGLIS.—On Tuesday, 26th February, Lord Glencorse presented his commission as Lord Justice-General and Lord President of the Court of Session, and after taking the usual oaths, took his seat on the Bench as Lord President. His Lordship then said:—My Lords, having been promoted by the favour of our gracious Sovereign to the highest judicial office in

Scotland, I trust it will be agreeable to your Lordships, as I am sure it will be a relief and satisfaction to my own mind, that I should endeavour to express, however imperfectly, the deep feeling of responsibility with which I enter upon the performance of my new duties. The responsibility is indeed most grave and serious, for I am persuaded that no man can occupy the position of President of this Court, even for a short time, without exercising a large and important influence for good or evil on the administration of justice, on the progress and development of the law and the strength and consistency of our judicial system, and by a necessary consequence, upon the happiness and well-being of the people. When I call to mind my predecessors who have gone before me in this chair, and their eminent characters and services, and particularly the three distinguished individuals who within my own recollection, and during the period of my professional life, successively discharged its duties with so much dignity, ability, and public advantage, I own that I am oppressed by most serious and painful misgivings as to my own competency to follow worthily in their footsteps. Of our venerable friend who has so recently left us I can scarcely trust myself to speak. The loss which we have thus sustained in this Court I suspect we are hardly even yet able fully to appreciate; for I believe there was no man more qualified by high intellectual gifts, by the integrity of his moral nature, and by the force of his character, to become President of a Supreme Court; and none ever filled that office who devoted himself with greater assiduity to cultivate and apply those talents with which he was blessed, so as to render them most conducive to the public good. That he attained to great success in his judicial office I need hardly say, for I am addressing those who were present when he bade us farewell; and and I am sure none who witnessed that scene will readily forget it. If I might be permitted, on such an occasion as this, to intrude for one moment my private and personal feelings, I should desire to add that, having served under him and been associated with him during my whole professional career, I have been so long and constantly accustomed to resort to his wise counsels, and to lean with confidence on his steady and generous friendship, that his removal from among us affects me with all the pain of personal misfortune. Still, there is much consolation in reflecting on the circumstances which attended his resignation. His great public services have met with a suitable but not more than an adequate recognition and reward in the honours which her Majesty has been graciously pleased to bestow upon him; and we rejoice to think that the unabated vigour and energy of his great mind will still find full scope for employment in a field of labour in which we know that he is most eminently fitted to excel. Though he be no longer personally present among us, I trust that his spirit will long continue to animate and pervade our deliberations, and to encourage and support us in encountering our judicial labours; and I feel certain that his bright example will serve as a great incentive and guide to the members of the legal profession to follow the path of honourable ambition with rectitude and integrity. My Lords, whatever may be the ultimate fate or success of the performance of my judicial functions among you, I know that you will give me credit now for a sincere and earnest desire to prove myself not unworthy of the great trust which has been reposed in me; and I am well assured that I shall not look in vain for that hearty co-operation and generous support from all my colleagues, without which any exertions of mine would indeed be altogether in vain. To the bar of Scotland, to the learning and ability, and high honour of its individual members, and to the thorough organisation and independence of the body, I apprehend, must be ascribed a great portion of the credit that arises from the satisfactory administration of the law; and I feel perfect confidence—a confidence rested not only on the well-earned reputation and the great forensic power of the leaders of the Bar, but upon that promise of future excellence which we see daily exhibited among the junior members—I say, I feel a perfect confidence for these reasons, that we shall receive in future all that valuable aid which in times past, as far back at least as my recollection reaches, the Court have ever derived from the Bar. And now, my Lords, I have but one word to say in conclusion, but it is a

word expressive of somewhat mixed feelings. While I have acted for now upwards of eight years as President of the other Division of the Court, I have been necessarily thrown into daily converse and the most intimate and familiar relations of friendship with the Judges of that Division. I think I may venture to say for them, as well as for myself, that during the whole course of that period the cordiality of our intercourse was never marred by one untoward occurrence, and that we part now—if, indeed, a parting it can be called—with the most sincere and ever-growing sentiments of mutual respect and affection.

Business of the Court of Session.—An Act of Sederunt has been passed extending the Sittings of both Divisions of the Court till Saturday 30th March inclusive. The Lord President has also transferred thirty causes from the roll of the First Division to that of the Second Division; and in the Outer House five causes from Lord Barcaple to Lord Kinloch, and four from Lord Jerviswoode to Lord Ormidale. It was supposed, from the early date for which the Second Division Jury Trials were fixed, that that Division would hold no extra sittings this session. But the Lord Justice-Clerk and his colleagues have doubtless remonstrated against being relieved from their just share of the serious amount of arrears which still obstruct the rolls. We fear, however, that even ten days' work of both Divisions at this period will make little impression on the large mass of business which is waiting for the leisure of the judges. Before the late transference of causes (6th March) there were 100 causes in the Ordinary Roll of the First Division, and 20 in the Summar Roll, besides a few causes in the Second Division Roll; and from 15 to 20 reclaiming notes have since passed through the Single Bills in the two Divisions. The First Division is only now hearing cases in which reclaiming notes were lodged at midsummer 1866. Surely suitors might fairly expect with the existing judicial establishment that their cases should not have to wait more than a month or two for the review of the Inner House. Much has already been done to keep down arrears, and it is to be hoped that Lord Glencorse will inaugurate his career as Lord President by a vigorous effort to bring the Divisions as nearly as may be abreast of the Outer House. Why should not the Court sit next Summer Session from 1st May to 31st July; and then begin the Winter Session at 15th October? This would give great relief to many anxious litigants, and would probably remove the necessity of extra sittings for two or three Sessions to come.

Proofs under the Evidence Act 1866.—We now lay before our readers the following interesting and important statistics of the working of the new system of taking Proofs during the Session which is just finished. We also add a note of the number of cases in which Issues were adjusted or reported by the Lords Ordinary during the last two Winter Sessions:—

Before Lord Kinloch.—6 Proofs went on. Only one lasted more than a day, and none of the others occupied a whole day. 12

cases set down for Proof were settled or delayed. Lord Kinloch rises with 14 Debates* on his ordinary Roll.

Before LORD JERVISWOODE.—14 Proofs went on. Several of these were very heavy: 1 lasted 3 days, 4 lasted 2 days each: the others a day or less. 7 cases set down for Proof were settled or delayed. Lord Jerviswoode rises with 16 Debates* on his Roll.

Before LORD ORMIDALE.—5 Proofs went on. One lasted 3 days, 2 two days each: the others less than a day: 1 settled. Lord Ormidale has 10 Debates* on his Roll.

Before LORD BARCAPLE.—7 Proofs went on. All lasted less than a day, and most of them only two or three hours. 6 delayed or settled. Lord Barcaple has still 16 Debates* on his Roll.

Before LORD MURE.—5 Proofs went on.—2 of these lasted more than a day. Lord Mure also took the Proof in 1 case, on a remit from the Second Division; the evidence in that case occupied part of three days. Lord Mure has 4 Debates* on his Roll.

Issues Adjusted or Reported.

	Winter Session 1865-66.	Winter Session 1866-67.
LORD KINLOCH,	32	11
LORD JERVISWOODE,	31	10
LORD BARCAPLE,	28	18
LORD ORMIDALE,	18	8

It should be stated that these last figures do not afford a fair comparison between the former system and the new one, because in several of the cases Issues had been ordered before the Evidence Act passed. Although we do not guarantee the exact accuracy of our figures, we have no doubt that they are substantially correct. It is perhaps unnecessary to add, that they do not include the Proofs taken by the Lords Ordinary under the Conjugal Rights Act. These have been fewer and less important in the Session just closed than in any Session since the passing of that Act.

These figures prove beyond all question that the new system of trial has not obstructed the business of the Court, and has not imposed an inordinate amount of work on the Judges. On the contrary, with all the additional time occupied in taking 38 Proofs, no Judge has more than a fortnight's debates to begin the Summer Session with; and it would rather seem that if there had been no Proofs to be taken in the Outer House, several of the Bars would have been empty during the last month, except for half an hour at the calling of the Motion Roll. We believe that about one half of the cases tried by the Lords Ordinary in this way have gone or are going to the Inner House on Reclaiming Notes.

* These debates in the case of each Lord Ordinary are exclusive of the debate on the Proofs taken under the new Act, all of which have been disposed of.

None have yet been heard by the Court; and until our experience of the operation of the Act is enlarged by observing the manner in which cases under it are dealt with by the Inner House, we abstain from expressing detailed opinions as to its working—opinions which would necessarily be only provisional. It will depend very much on the degree of respect shown by the Court to the findings in fact of the Lords Ordinary (which, we regret to say, are not always separated in their interlocutors from the findings in law, as they ought to be), how far the new system shall finally be pronounced satisfactory. If the verdict of the judge who has seen the witnesses is recklessly set aside by the Court of Review, the new Act will have done but little, at least as compared with trials by jury, to promote either speed or certainty in the settlement of questions of disputed facts.

The decrease in the number of issues adjusted for trial by jury is also remarkable. It is a curious coincidence that the sum of the proofs taken, and the issues adjusted in cases before each Lord Ordinary last session, is nearly equal to the number of issues at the same bar in the previous winter session. This indicates a considerable relief to the Summar Rolls of the Divisions, which, however, may be counterbalanced if undue encouragement is given to reclaiming notes upon questions of fact.

In the meantime one thing is clear, that the proofs taken before the Lords Ordinary have been much more rapidly despatched than proofs on commission. A comparison with jury trials is less easily made; but we apprehend that even here the new system would be found not very much more dilatory in average cases, and in some greatly more expeditious.

Mr. M'Lagan's Game Bill.—The bill introduced into Parliament under the auspices of Mr. M'Lagan, Mr. Fordyce, and Sir W. Stirling Maxwell, to amend the laws relating to the preservation of game in Scotland, deserves on more than one account to be made the subject of a few observations. It is remarkable as being an attempt to settle, and, so far as it goes, to settle impartially this vexed question. No subject perhaps has received a greater share of the attention of the Legislature; and it is little to the credit of our legislators to find it admitted on all sides that no subject stands in greater need of further legislation. There are three main grievances connected with the present game-laws, all of which we think will be in some measure alleviated, if not wholly removed, by the present bill.

In the first place, as we have before pointed out (vol. iii., p. 281), there is a well-known principle of justice common to all jurisprudence, and ignored in the statute-book in the case of the game-laws alone, that no man shall be judge in his own case. Thus no miller or baker can act as justice under the "Bread Act;" no military officer in billeting soldiers under the Annual Mutiny Act; no brewer under the Licensing Act; and there are many instances too

numerous to detail. But in the case of the game-laws—which are certainly laws regulating the relations between two classes of society —the landlords and their game-tenants on the one hand, and the farmers and labourers on the other, the only tribunal before which offences under these Acts can be tried consists of Justices of the Peace. It is therefore not to be wondered at that great discontent has arisen, and much odium has fallen on the whole game-laws, from the fact that courts composed practically of country gentlemen should have the sole jurisdiction in perhaps the only cases in which their interests as a class are concerned.

It is proposed to remove this anomaly by the 4th sect. of the present bill, by which it will be enacted that "all powers, authority, and jurisdiction given by any" of those laws (*i.e.*, the game laws) "shall henceforth be vested in and exercised by the Sheriff or Sheriff-Substitute." In regard to this alteration, we can only express our surprise that it has not been made long ago. It removes from the Justices what we cannot doubt they find a most painful responsibility—viz., committing to prison and perhaps making a jail-bird for life of some honest enough country lad as a punishment for what is, after all, only a very natural prank.

The second great grievance has also been pointed out in a former article in this journal. The game-laws are the only system of laws under which a man may be punished more than once for the same act. Thus, for example, by bagging a single bird, a poacher may expose himself to prosecution under the Night Poaching Act with its penalty of 18 months imprisonment: the Game Qualification Act: the Statute of 1707: the Revenue Statutes, and finally be interdicted from putting his foot on the forbidden soil on any pretence whatever. This state of matters it is proposed to remedy by § 5, of which the rubric is, "No one to be prosecuted again for the same offence."

The third grievance, and perhaps the main cause of the discontent to which the game-laws are now giving rise, is the destruction of the farmer's crops by game. The present bill makes at least a vigorous attempt to remedy this evil: and although the remedy proposed in Section 3 against over-preserving is perhaps the point in the bill as to the effects of which we have the most doubt, it is impossible not to praise the promoters of the bill for their impartiality and moderation. Hares and Rabbits are undoubtedly the most destructive kind of game. Accordingly it is proposed, that "Hares and Rabbits shall not be deemed to be game within the meaning of the game-laws, nor shall any of the provisions of these laws apply to the killing or destroying of hares and rabbits."

By this section, it is made impossible for a proprietor to punish strangers coming upon his land and shooting hares and rabbits, under any of the Game acts, or any of the Trespass acts—except, indeed, under one old Scots Act, which has become obsolete, because the penalty is now only nominal. It is well then that the public

should be made aware of the effect of this section. By taking hares and rabbits out of the game laws, the tenant-farmer will obtain the right of shooting them. But what will be the result? There can be no doubt, that in all the worst cases of over-preserving, the landlord will make an arrangement in the lease effectually excluding the tenant's right. Consequently, if the land is well watched by keepers, the tenant will be in as bad a plight as before. But, then, any one else may come on the land and shoot. If a landlord find a poacher upon his ground, the man will of course profess to have come in pursuit of hares and rabbits; and all that can be done is to order him off, and warn him that the NEXT time he is found there, an interdict will be taken out against him.

In fact, by this Section of the Bill, everybody is permitted one day's shooting of hares and rabbits upon everybody else's land in Scotland, without being liable for any penalty whatsoever. And the only means by which a poacher may be prevented from prolonging his sport for a month is by taking out an interdict against him in a civil court. This, we think, is no imaginary danger. For it is well known that much poaching is prevented by the farmers' dislike to have people trespassing on their farms. But if we suppose a farmer to be excluded by the terms of his lease from keeping down hares and rabbits, he may not be inclined to watch the lands very narrowly. He may keep off the general public; but may relax his vigilance in favour of one or two individuals, who are likely to do more harm to the game than to his standing crop. If, then, persons are found on a farm with guns in their hands, they cannot be prosecuted, under any of the game-acts—or under the Night or Day Trespass Acts, for shooting: and to show that they are tresspassers will be very difficult if they have the slightest pretence for seeing the farmer on business or pleasure, or if they are the most distant acquaintances of his or his servants. If they are proved trespassers, they are subject only to a nominal penalty in Scots money, under an old Scots Act.

We think that both those who are in favour of the Bill, and those who are against it, would be wise to consider well, whether Scotland is ripe for such a sweeping change in the law as is here contemplated.

The Recovery of Certain Debts (Scotland) Bill, proceeds on a recital of the Small Debt Act and Sheriff Court Act. The short title, the "Book Debt Recovery (Scotland) Act, 1867," describes popularly the kind of claims to which it is intended to apply, and which are more accurately defined, in sec. 2, as "all actions of debt that may competently be brought before him, (the Sheriff), for House Maills, Men's ordinaries, Servant's Fees, Merchants' Accounts, and other the like Debts," above £12 and below £50. These are the terms it will be observed of the Act 1579, c. 83, introducing the Triennial Prescription, but with the omission, immediately after the passage quoted, of the words contained in that statute, "that are not founded

upon written obligations." Sec. 3 enacts that all actions brought in the summary manner afterwards provided shall proceed on an ordinary Small Debt Summons or Complaint; but the summons shall not contain or constitute a warrant to cite witnesses or havers. By sec. 4 it is made competent for all parties to appear and plead by a procurator of Court. It is to be regretted that the framers of the Act have not taken this opportunity to repeal the unfortunate provision of the Act of 1837, excluding procurators from pleading in Small Debt cases.

The fifth sec. incorporates secs. 6, 8, 9, 11, 12, 18, 19, 21, 23, 24, 25. 26, 28, 29, 34, 35, 36 of the Act of 1837 and relative schedules, except in so far as they may be inconsistent with the new Act, with the necessary alterations as to the nature and value of the actions to which the new Act relates, and with a proviso that the prescription of arrestments shall be regulated, not by sec. 6 of the recited Act, but by 1 and 2 Vict. c. 114. It will be observed that the incorporation of sec. 23 obliges the Sheriff to hold Circuit Courts, which we presume are to be at the same places and times as the existing Small Debt Circuit Courts; but we understand that this section is likely to be altered by the promoters of the bill, so as to apply only to the first diet at which parties appear, otherwise cases would be delayed for the whole period between one circuit and another. It would be more convenient, we should have thought, to make it apply to the second diet, at which witnesses are to be examined, rather than to the first, where only parties appear. It is worth considering whether the 26th sec. of the Small Debt Act should not be altered so as to make actions under both Acts competent only in the Circuit Court within the territory of which the defender is domiciled, instead of giving the pursuer the option of convening him at the ordinary court town. We have known much hardship inflicted on a defender in this way, where he resided at a distance from the county town.

Sec. 6 relates to decrees in absence, and is nearly in the same terms as the 15th sec. of the Small Debt Act. It provides that decrees in absence shall be as nearly as may be in the form, and shall have the same effect, and be followed by the same execution and diligence as small debt decrees in absence. Sec. 7 incorporates sec. 16 of the Small Debt Act as to re-hearing, extending the privilege to a pursuer in whose absence a defender has obtained absolvitor.

Where both parties appear, whether at the diet mentioned in the summons, at an adjourned diet, or at the diet for hearing under the previous section, the Sheriff is directed by sec. 8 to inquire into the nature of the action and defence, and to make a short note of the pleas of parties, which shall form part of the process. If he shall see it to be necessary for the ends of justice, the Sheriff may remit the cause to the ordinary roll; but if not, he "shall fix a time and place for proceeding to try and determine the same, and shall ordain the parties then to attend, and shall grant warrant to cite witnesses

and havers." At such diet, which may be adjourned only when the ends of justice require it, he shall hear the parties *viva voce*, examine witnesses and havers, and also the parties. (See Dickson on Evidence, § 1712.) He is authorized to remit to persons of skill to report, and to commissioners to take the evidence of persons unable to attend, upon special cause, which is to be entered in the Sheriff-Clerk's book of causes. The judgment is to be in all respects as nearly as may be of the same form and effect as a judgment under § 13 of the Small Debt Act.

The Sheriff is required by § 9, but only upon requisition by either party before any evidence has been taken or any admissions made, to take a note of the evidence and the facts admitted in the form of a narrative, of the documents produced, of evidence tendered and rejected, and of objections taken and repelled. This note of evidence is to be part of the process. It may be either taken by the Sheriff's own hand, or dictated by him to a clerk, or "on the motion of either of the parties, and at the expense of the party or parties so moving to a writer skilled in short-hand writing, to whom the oath *de fideli administratione officii* shall be administered." The extended notes of the short-hand writer are to be certified by the Sheriff. The judgment upon the evidence so recorded must set forth separate findings in law and in fact. Where no note of evidence has been taken the Sheriff's judgment shall be final (§ 10). But where the case is heard and a note of evidence is taken by the Sheriff-Substitute, and a judgment finally disposing of the cause is pronounced, either party may appeal within eight days, and the Sheriff shall decide without delay, and with or without re-hearing. The appeal brings under review all previous interlocutors. If the Sheriff alter he shall set forth separate findings in law and fact; and he may order additional evidence or a new trial before himself or his substitute. Where a note of evidence has been taken, and the cause exceeds the value of L.25, and has been heard by the Sheriff-Depute in the first instance, either party may within eight days appeal (§ 12) to either Division of the Court of Session, or to any Lord Ordinary. It would probably be more satisfactory that the appeal should be only to the Court, as litigants will derive little satisfaction from three perhaps conflicting decisions by single judges. Sometimes the judgment of a Lord Ordinary has little more weight than that of a Sheriff. The case is to be taken to the Court of Session by a simple form of appeal written under the interlocutor, specifying the Court to which the appeal is taken. Provisions are made for transmitting the process, and it is to be enacted that, after intimation to the respondent, the Court or Lord Ordinary shall hear the cause summarily without any written pleadings. Power is given to order the case to be re-heard, and evidence to be taken of new or additional evidence to be taken by the Sheriff or Sheriff-Substitute, with such directions as shall seem right; and the decree or judgment pronounced on such re-hearing shall be treated in all

respects as if it had been pronounced by the Sheriff or Sheriff-Substitute in the first instance. The judgment of the Court of Session or the Lord Ordinary is final. The same right of appeal, and under the same limitations, is allowed by § 13 against a judgment pronounced by the Sheriff on appeal from the Sheriff-Substitute.

Sec. 14 provides for printing the papers when the cause is brought to the Court of Session by appeal. Sec. 15 directs the Sheriff-Clerk to keep a book of causes, and is in similar terms to sec. 17 of the Act of 1837. Sec. 16 incorporates sec. 20 of the said Act as to poindings and sales. Sec. 17 excludes every form of review except as provided in the Act; and sec. 18 establishes a table of fees. It is, however, mere mockery to allow procurators to appear in actions brought under the Act, if that permission is neutralized by cutting down these fees to the illusory sums specified here. We do not wonder that the Glasgow procurators have been goaded into petitioning against an Act which would limit the remuneration of educated professional men to something less than the earnings of cabmen. The largest fee to be allowed for the whole conduct of any cause under the Act, including "the whole sums exigible, whether as between party and party or between client and agent, for taking instructions to prosecute or defend the action, instructing officers to cite parties or witnesses, or to arrest on the dependence, revising summonses, and citations, and executions, precognoscing witnesses, attending proofs and debates, writing and signing appeals, correspondence, and generally doing everything requisite for commencing and carrying on the action or the defence, until final judgment or decree in the Sheriff-Court," cannot in any case exceed £2 sterling! This requires no comment.

The Bill, as a whole, is susceptible of very material improvements in committee, some of which we have indicated; and if it receives them it may satisfy the urgent demand of the commercial classes for what is called cheap law. We do not agree with those who sneer at cheap law, and imagine that all law must be of bad quality unless paid for by exorbitant fees. Neither do we believe that the law administered in the Small Debt Courts deserves all the abuse it gets. It is not on this ground that this Bill seems most questionable, but rather because it introduces a new form of process into the local courts of Scotland. There are already two methods of procedure in the Ordinary Court, another in the Small Debt Court, and now we are to have a fourth, a sort of hybrid between the other species. It is not perhaps fair to write against a Bill which has no friends in Parliament to speak for it; but we confess that we entertain an opinion—perhaps an Utopian one—that the reform of Sheriff Court process ought to be based on the principle of uniformity of procedure. We do not see why the ordinary Summons should not be adapted to every kind of action—cases under £25 being disposed of as small debt cases are now, with an appeal on points of law in the form of a case stated; and cases above that value being decided

upon a minute of defence, in the present form, except where the Sheriff thought fit to order condescendences. The present Bill may be a step towards such an improved state of things; but if it were to retard it, we should consider that a strong reason why it should not pass. If it is to pass it should certainly provide for an appeal on questions of law by a case stated, even where parties have not required a note of evidence to be taken. Without such a provision the measure will, we believe, do more harm than good.

The Chair of Conveyancing in Glasgow.—Within the past month we have learned of the retirement of Professor Kirkwood from this Chair, and of the appointment of his successor. In a letter addressed on 4th March to the Dean and Council of the Faculty of Procurators in Glasgow, who are patrons of the Chair, and to the members of the University Council, Mr Kirkwood stated, that his health would no longer permit of his continuing his connection with the University, and at the same time devoting the necessary time and attention to his business, which he considered his first professional duty. At a meeting of the Dean and Council held on the 15th ult., Mr James Roberton of the firm of Towers Clark, Roberton, and Ross, was called to the vacant Professorship.

When a chair of conveyancing was established six years ago in Glasgow University, Mr Kirkwood was at once called to fill it by the unanimous voice of the profession in Glasgow. From his long and well-deserved reputation as a conveyancer, and the zeal and energy which he manifested in everything he undertook, his name had always been mentioned in connection with this chair when its foundation was but in prospect. The manner in which he performed the laborious duties of the office, proved how justly his professional brethren had estimated his capacity. During the short period of his professorship he completed an admirable series of lectures, distinguished especially by the clear and able manner in which the first principles of conveyancing were illustrated and applied to everyday practice, without the mind of the student being confused and perplexed by a too minute notice of trivial business forms and details. We cannot but regret the early retirement of Mr Kirkwood from a post which he was so well qualified to fill, as well as the cause which led to his taking such a step. But we must congratulate the legal Faculty in Glasgow that they have been able to select from their own number so worthy a successor. Himself an enthusiast in his profession, Mr Roberton will, we are assured, do all that can be done to interest his students in the very important, but to the young lawyer, somewhat dry subject on which he has to lecture.

Appointments.—Solicitor-General Gordon, as we stated last month, has been appointed Lord Advocate in room of Mr Patton, now Lord Justice-Clerk; and Mr John Millar, as we also anticipated, has succeeded him as Solicitor-General. Mr Millar came to the Bar in 1842. In consequence of his promotion, Mr Roger Montgomerie (1852) has become an Advocate-Depute, and Mr Robert Lee (1853) has

been appointed successor to Mr Montgomerie as Advocate-Depute for the Sheriff Courts. The following gentlemen have been nominated as honorary Advocates-Depute, and have duly taken the oaths—viz., G. H. Pattison, J. P. Wilson, Charles Scott, John M. Duncan, John Marshall, Wm. Watson, Wm. E. Gloag, John Skelton, John Burnet, David Boyle Hope, Wm. Lamond, Robert Johnstone, John H. A. Macdonald, and Alex. Blair, Esquires.

The English Law of Prescription.—The recent case of *Bryant* v. *Foote* in the Court of Queen's Bench has drawn attention to the singularity of the English law of prescription, which, except as altered for certain kinds of rights by modern statutes, fixes the period of legal memory at the beginning of the reign of Richard I. (1189), so that every prescriptive claim is at common law deemed indefeasible if existing previous to that date; and, on the other hand, is at once at an end if shown to have had its commencement since that period. The strong language in which Lord Chief-Justice Cockburn characterized this rule, and the serious effect which the judgment in this case must have on many patrimonial rights, have necessarily excited apprehensions, and may seem to forebode some change of the law. We give elsewhere at some length the judgment of the Lord Chief-Justice, believing that our readers will be interested in the lucid exposition which it gives of the course of judicial legislation on this subject in the sister country.

Attorneys' Certificate Tax.—The *Law Times* says, in reference to the bill brought in by Mr Denman to reduce this license to 5s. annually, "Mr Disraeli appears to be as impervious as was Mr Gladstone to argument and persuasion for the abolition of this unjust imposition. The claim of the solicitors for relief rests upon the fact that they are subjected to a special tax without receiving some special advantage as an equivalent for it. Barristers, doctors, architects, are exempt from this tax; and so also are three-fourths of the trades. To this case, what is the answer? That there are several callings subjected to a similar tax, that it would be unfair to relieve one without also relieving the others, and that the revenue could not afford to sacrifice the entire of its income from licences. But surely the greatness of a wrong does not justify its continuance. The obvious reply is, tax all equally, or relieve those who are specially burdened. If the licensing system is good, make it universal; if bad, abolish it. Mr Denman is entitled to the gratitude of the profession for his persistent efforts to relieve us from this burden. Let him persevere in spite of disappointment. The profession should strengthen Mr Denman's hands by each one of us personally urging the members for his town or county to support the bill."

Protection to Wife's Property.—The *Irish Law Times* calls attention to a case in the Irish Court of Probate, from which it would seem that an English order for the protection of the earnings of a wife deserted in England, does not protect earnings made in Ireland (and for the same reason in Scotland) if she goes to that country after obtaining such an order. This arises from the limitation of the order to "property in England she may have acquired or may acquire by her own lawful industry," in 21 & 22 Vict., c. 108, sec. 6. The corresponding Irish and Scotch Acts (28 & 29 Vict., c. 40, and 24 & 25 Vict., c. 86) do not contain any such limitation, and neither did the earlier English statute 20 & 21 Vict., c. 85, sec. 21. It thus appears that there has been an oversight in a matter of considerable importance to married women, which, says our cotemporary, "it behoves the Legislature promptly to remedy."

Limited Liability Acts.—The following members of the House of Commons have been nominated the Select Committee on the Limited Liability Acts:—Mr Watkin, Mr Goschen, Lord F. Cavendish, Mr G. G. Glyn, Mr Brett, Lord R. Montagu, Mr S. Cave, Mr Hubbard, Mr Graves, the Solicitor-General, Mr Lowe, Mr Finlay, Mr Alderman Salomons, Sir G. Montgomery, and Mr Vance. The *Law*

Times, in commenting on the past working of the Law of Limited Liability, with reference to this Committee, expresses an opinion that it requires to be somewhat restrained in its operation. It points out that the joint-stock principle is adapted only for enterprises too extensive to be undertaken by individuals, and that the present law makes no sufficient provision for information to creditors of the state of affairs. "With limited liability credit is given to the business, and not to the individual shareholders; yet does not the Act enable the creditors to ascertain what is the state of the business. It compels the publication of an annual balance-sheet for the information of the shareholders, but it does not give to the public or to creditors access to information that is of more importance to them than to the shareholders. We believe, therefore, that the inquiry will show the necessity for two provisions which have been repeatedly urged here: 1st, To permit limited liability only to companies whose subscribed capital amounts to a certain sum—say L.20,000. 2d, To allow the printed annual balance of the company sent to the shareholders to be inspected by any person at the company's office, as is the register of shareholders. A further question will be mooted, which will require somewhat more consideration—viz., whether the French plan should not be adopted, which, while limiting the liability of the shareholders leaves the directors, who have the power to regulate expenditure, with unlimited liability."

THE ENGLISH BANKRUPTCY BILL.—The Attorney-General has introduced a bill, of which we have not yet seen a copy, but which, he stated in the House of Commons, adopts unreservedly the principle recommended by the Select Committee of 1864-5, that "creditors should be allowed to appoint trustees of their own choosing and paying, and that the estate should be handed over to them, with suitable precautions." That is to say, it adopts the principle now practised in Scotland. The favour with which this principle is already viewed by the mercantile classes in England is proved by the bankruptcy statistics for the year ending October last, which show the gross produce realised from bankrupts' estates, and of the gross value of estates and effects administered and sums paid under deeds of arrangement. The amount in bankruptcy for the year in question was L.730,361, that is, L.464,271 realised by creditors' assignees, and L.266,090 by official assignees; the amount under deeds was L.9,475,100, being under deeds of assignment L.3,619,800, of composition (paid) L.2,862,800, and of inspectorship L.2,992,500. "It is abundantly clear," says the *Law Times*, "that the official assignees' occupation's gone. Parliament, if it adopts the Scotch system, will be merely confirming what the mercantile public has already done by its own choice. Not one thirtieth part of the whole finance of insolvency has been left in the hands of the officers of the court. Perhaps little more will now be required than some safeguards against fraud in deeds." The Attorney-General proposes in another bill to abolish imprisonment for debt, except in cases of fraud, and to extend the Small Debts Act to sums of L.50 instead of L.20. The business of the Court of Bankruptcy will be materially diminished, Sir John Rolt tells us, by the new law placing bankrupt estates in the hands of the creditors or their assignees; or rather, as these statistics show, it is already very much diminished. Indeed, he says, "the business will be reduced to the adjudication, determining whether a man has become insolvent in the meaning of the bankruptcy law, the examination of the bankrupt, the proof of disputed debts, and the question of discharge." These matters he proposes to commit to the County Courts, with some apparatus for central work in London, and an appeal to the existing Court of Appeal in Chancery.

APPOINTMENTS—ENGLAND.—Edward Wallace Goodlake, Esq., barrister, of the Oxford Circuit, to be Police Magistrate at Hong-Kong. Henry Stewart Cunningham, Esq., barrister, of the Home Circuit, to be Advocate and Legal Adviser to the Government of the Punjab.

APPOINTMENTS—IRELAND.—Mr Brewster has been appointed Lord Chancellor, vice Blackburne resigned; Mr Justice Christian, Lord Justice of Appeal; Mr Morris, M.P., Justice of Common Pleas; Mr Chatterton, M.P., Attorney-General; and Mr Warren, Solicitor-General.

COMPENSATION FOR RAILWAY INJURIES.—The *Times* of March 18 contains reports of two actions against the Lancashire and Yorkshire Railway Company for injuries received in railway accidents, both tried at Manchester Spring Assizes, in one of which the plaintiff, a cage manufacturer, obtained a verdict for L.600, and in the other an ironfounder at Staleybridge was awarded L.1500 by the jury. Both seem to have been cases of "railway spine."

SPRING VACATION ARRANGEMENTS—1867.

Box Days—Thursday, 18th April, and Thursday, 2d May.

BILL CHAMBER ROTATION OF JUDGES.

Thursday, 21st March, to Saturday, 30th March—Lord Kinloch.
Monday, 1st April, to Saturday, 13th April—Lord Ormidale.
Monday, 15th April, to Saturday, 27th April—Lord Barcaple.
Monday, 29th April, to Saturday, 11th May—Lord Mure.

SPRING CIRCUITS, 1867.

North.

The Lord Justice-Clerk and Lord Deas.

Dundee—Friday, 5th April. *Perth*—Monday, 8th April. *Aberdeen*—Friday, 12th April. *Inverness*—Monday, 15th April. James Adam, Esq., Advocate-Depute; Mr R. L. Stuart, Clerk.

South.

Lord Cowan and Lord Jerviswoode.

Ayr—Tuesday, 9th April. *Dumfries*—Friday, 12th April. *Jedburgh*—Tuesday, 16th April. Roger Montgomerie, Esq., Advocate-Depute; Mr W. Hamilton Bell, Clerk.

West.

Lord Ardmillan and Lord Neaves.

Stirling—Thursday, 11th April. *Inverary*—Wednesday, 17th April. *Glasgow*—Wednesday, 24th April—at twelve. R. B. Blackburn, Esq., Advocate-Depute; Mr Æneas Macbean, Clerk.

The May number of the *Journal of Jurisprudence* will contain an article reviewing the numerous cases involving points in the Law of Joint-Stock Companies, which have occurred, chiefly in the English Courts, during the past year.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

DENNEL *v.* SMELLIE.—*Feb.* 23.

Testament—Destination—Revocation—Reserved Power.

Count and reckoning in which the question was as to the right of the pursuer to a share of the rents of a property in Edinburgh, some time belonging to the deceased Robert Smellie, his great-grandfather and the father of the defender. In 1835 Robert Smellie purchased the property, and took the titles to himself and his wife in conjunct-fee and liferent, for her liferent use allenarly, and to the children of the marriage equally among them in fee, reserving full power to himself to deal with the property as if he were absolute fiar. In Feb. 1846, Robert Smellie executed a will in which he provided—"I further allow that, if my son Henry wishes, he will get the Canongate property at £160." Henry Smellie, the defender, exercised this option, and at his father's death took possession of the property, and, he alleged, he duly paid the £160 to his brothers and sisters. He made up a feudal title as his father's heir, and drew the rents. This action was brought on the ground that the original destination had never been effectually revoked, and therefore that the pursuer, who is grandson and heir of one of Robert's daughters, was entitled to one-sixth of the subjects and one-sixth of the rents since Robert's death. The Lord Ordinary (Jerviswoode) assoilzied the defender, on the ground that the will revoked the destination. The Court adhered, on different grounds.

Lord CURRIEHILL held that the defender had an *ex facie* valid feudal title to the subjects, which, while unreduced, was a good defence to a petitory action of this sort.

Lord DEAS and ARDMILLAN held that on the merits the defender was entitled to absolvitor. Without deciding whether the will was competent to revoke the destination, the provision in the will founded on was within the reserved power in the original deed, and was therefore to be given effect to whether the deed was revoked or not.

Act.—Orr Paterson. Agents.—J. & A. Peddie, W.S.——Alt.—Gifford and Balfour. Agent—G. Cotton, S.S.C.

WATT *v.* SCOTTISH NORTH-EASTERN RAILWAY COMPANY.—*Feb.* 27.

Diligence—Arrestment—Title to Sue—Assignation—Transfer—Shareholder.

Anderson was proprietor of stock of the railway company, which, with the half-yearly dividend declared on 31st January 1863, was arrested by the company in their own hands on the dependence of a summons against Anderson, at their instance, for carriages due to them. In June 1863, Anderson raised the present action of declarator and reduction to set aside the arrestment, with declaratory and petitory conclusions as to the

dividends. The railway company pleaded—(1) That their right of retention was a title to exclude, and at all events was a good defence against the declaratory and petitory conclusions of the action; (2) That the arrestment was valid. Anderson having assigned his share, the Court found —20th Jan. 1866, 4 Macph. 315—Watt, his assignee, entitled to insist although the defenders had refused to register him as a shareholder. On 16th Nov. 1864, the Court sustained the first plea for the defenders, in so far as the petitory conclusion of the summons was concerned, repelled it as to the declaratory and reductive conclusions of the action of reduction, and remitted. Before the Lord Ordinary (Jerviswoode) defenders consented to reduction of the arrestment, but maintained their plea of retention as against the declaratory and petitory conclusions in so far as not disposed of by the interlocutor of 16th Nov. 1864. His Lordship accordingly decerned in favour of Watt in terms of the reductive conclusions, and also in terms of the declaratory and petitory conclusions. Against the latter portion of this interlocutor the defenders reclaimed—1st, On the ground that the petitory conclusions had been disposed of by the interlocutor of 16th Nov. 1864; and, 2nd, that, having a right of retention, not only of the dividends, but of the stock, at the date of the assignation to Watt, they were entitled to retain it against all assignees until paid their debt.

At the advising to-day, the Court reduced in terms of the reductive conclusions, held the petitory conclusions disposed of, and *quoad ultra* dismissed the action—1st, because the declaratory conclusions were to be looked on merely as a part of the action of reduction of the arrestment, and were as such disposed of by the interlocutor of 16th Nov. 1864; and, 2nd, because Watt, though entitled to be sisted and insist in the action, had no active title to compel decree under the declaratory conclusions until he had been registered as a shareholder. No one could demand payment of dividends till he appeared on the books of the company as a shareholder. Whether the Company was right in refusing to recognise Anderson's right to assign and in declining to register the transfer, was a point not raised in this action, and it would be most inconvenient, if not incompetent, to decide in this action whether Watt was entitled to be registered, or whether the Company was entitled to refuse to receive any purchaser.

Act.—Thoms. Agent—W. Officer, S.S.C.——Alt.—Birnie. Agent—J. Webster, S.S.C.

LORD BLANTYRE, &c. *v.* CLYDE NAVIGATION TRUSTEE.—*March* 1.

Reparation—Statutory Powers—Clyde Navigation Acts—Lands Clauses Acts.

Action by a riparian proprietor on the Clyde for declarator that defenders were bound to raise the foreshore left by their statutory operations between the main channel of the river and his lands to such a level as would prevent it from being overflowed at springtides, or at least to such a height as would prevent it from being a nuisance; that they were bound to repair the damage done to his property by their operations; and for damages, —*dismissed* in respect that it was not averred that the trustees had done anything illegal or beyond their statutory powers, and that the pursuer's proper remedy was to claim compensation in the manner provided by the statutes. Tentative issues ordered with respect to conclusions relative to operations for protection of ferries belonging to pursuer, which he alleged the defenders were bound to execute.

MACINTYRE *v.* MACRAILD.—*March* 2.

Process—Admission on Record.

Suspension and interdict at the instance of Macintyre, M.D., practising at Fort-William, against Macraild, who had been for some time his assistant at Brecklet, South Ballachulish, Argyleshire, praying to have respondent interdicted "from practising medicine or surgery at the slate quarries of South Ballachulish, and in the adjacent villages of South Ballachulish, Brecklet, and Carnock, where the workmen at the said quarries reside, and from otherwise interfering with the professional practice of the complainer and his assistant, at the said quarries, and in the said villages." The complainer founded on an alleged agreement, dated Nov. 28, 1864, in which respondent bound himself to continue to act "consistent with a professional honour" and the said Duncan Macintyre's interests, "as long as his connection with him as assistant should last." He also bound himself under a penalty of £500 that he should not accept of the practice of the slate quarries, in case of its being offered to him, to the complainer's exclusion and disadvantage at any future period, nor settle down to practice in the complainer's vicinity. In his original answers to this note of suspension, the respondent admitted that the document founded on was written and signed by him; and on this footing the Lord Ordinary on the Bills granted interim interdict. This judgment was affirmed (4 Macph., 571.) The respondent's revised statement alleged that the document founded on by complainer had been forged by him, and that, although respondent had signed an obligation of the kind referred to, yet, when he had seen it for the first time, when the case was at avizandum in the Inner House on the question of interim interdict, he had found that it differed in certain material words from that founded on. He took his stand on this allegation of forgery, which the complainer pleaded, he was now barred from founding on.

The Lord Ordinary (Kinloch) reported the case to the Court in consequence of the unprecedented nature of the circumstances.

LORD PRESIDENT—So far as his Lordship knew, the circumstances were unprecedented. The respondent, in his original answers, admitted distinctly, and without reserve or qualification, that he himself wrote and signed the document on which the suspender founded. He now alleged that that document was a forgery, neither written nor signed by him. At first sight one was inclined to hold it impossible to allow a party so to reverse his allegations in the course of a cause. On looking further into the case that difficulty was increased. What he now alleged was that he did write and sign a document on the same subject as that founded on, that he had incautiously instructed his agent to admit that, but had not had access to see it till after the hearing in the First Division, when he discovered that the document founded on in the suspension and interdict was not that which he had written and signed, but a different document, which he then saw for the first time, and which was a fabrication and forgery. For anything yet seen, it was possible that that allegation might be true. If so, then a crime had been committed against the respondent, and he was entitled to the fullest remedy. His Lordship would say nothing as to the probability of the statement, for at present the Court had nothing to do with probability, but only with the question whether the party had made an averment as to which he was entitled to probation. Under the circumstances, however, the re-

spondent was entitled to no favour; it would be of evil example to allow him now, *ope exceptionis*, to allege and prove the forgery. In short, the respondent ought not to be allowed in this process to plead forgery unless he sustained his plea by producing a decree of reduction improbation. The complainer's interest was protected in the meantime by the standing interim interdict; and this process, his Lordship suggested, should be sisted until the respondent could follow out such an action. If within a limited time he failed to do so, he ought to be held precluded from maintaining the plea of forgery.

Lord CURRIEHILL concurred, observing that his only difficulty was whether enough had not already taken place to bar the respondent from pleading forgery.

Lords DEAS and ARDMILLAN concurred.

Act.—N. C. Campbell. Agent—John Patten, W.S.——Alt.—W. N. M'Laren. Agent—J. M. Macqueen, S.S.C.

MOORE *v.* FORTH IRON COMPANY.—*March* 5.

Jury Trial—A. of S. 16*th Feb.* 1841 § 46.

Action of damages for wrongous dismissal from the situation of manager of the company's works. Issues adjusted 2d Feb. 1866. A judicial tender was made 20th Feb. Commission was obtained by pursuer, 28th Feb., to examine the defenders' books to get evidence of the profits made, Moore's salary having been to some extent regulated by a percentage. An arrangement was made that the books should be examined by an accountant, on behalf of the pursuer, but only in presence of another accountant on behalf of the defenders. On 3d Dec. 1866, pursuer's agent countermanded a notice for trial at the Christmas sittings, on the ground that the men of business could not have the examination of the books completed in time; and he gave notice of trial for March. No objection was taken to this delay, and meetings took place between the accountants in Jan. and Feb. 1867. On 28th Feb. 1867, pursuer's agent intimated acceptance of the tender, and a judicial minute to that effect was lodged on March 1. Defenders moved for absolvitor in terms of sec. 46 of the Act of Sederunt 1841. Blair *v.* Blair, 22 D. 1271, and Angus *v.* Grier, 16 D. 303, were referred to.

LORD PRESIDENT—Though the provision of the A. of S. was wholesome it might be strained so as to work injustice but for the discretion left to the Court. Sufficient cause for the delay had been shown. The fair and natural arrangement as to the mode of conducting an investigation which was certainly out of the ordinary course, was calculated to cause delay. It was not said that the motive assigned for the countermand and new notice of 3d Dec. was unfounded in fact. Defender could have asked the Court to fix the trial for Christmas if he had felt aggrieved; but instead of doing so, went on afterwards preparing for the trial jointly with the pursuer.

The other judges concurred, Lord Deas observing that it was material that the acceptance of the tender preceded the motion to have the action dismissed. Motion refused, expenses of this discussion being allowed in respect of the circumstance to which Lord Deas had called attention.

Act.—Watson. Agent—A. K. Morison, S.S.C.——Alt.—Young & Clark. Agents—Lindsay & Paterson, W.S.

CAMPBELL *v.* MACALLUM, &c.—*March* 6.

Property—Lease—Servitude—Pasturage—Feu-right.

Declarator by Campbell of Aros against feuars in Tobermory, who claim rights of pasturage and cutting peat on his property, that he was absolute proprietor of his estate, free from any privileges whatever on the part of the defenders, and in particular from any right of pasturage on the Muirlawn, and of cutting peats on the muir. In 1789 the British Fishery Society, incorporated by 26 Geo. III., c. 106, published regulations for building and lotting land at Tobermory. The lots were to be granted on leases of ninety-nine years, renewable for ever. The eighth regulation declared "that every inhabitant shall have a right to dig peat for his own use in any of the Society's mosses, and also to a summer's grazing for a cow on the Muirlawn of the Society, on paying a sum not exceeding 7s. 6d. per annum for the above privileges." The Lord Ordinary (Kinloch) found that the defenders had failed to establish the rights claimed. The defenders reclaimed.

LORD CURRIEHILL, after narrating the form of the action, the origin and purpose of the British Fisheries Society, and the regulations published in 1789, said these rules were an offer to all the world; they were intended to induce people to come forward and take lots, and the Society put itself somewhat in the position of a party selling by unreserved auction. A number of persons closed with the offer. It appeared that no other title was at first given to the allottees than the entry of their names in rentals kept by the Society. These rentals were important, containing, in tabulated form, the conditions on which the allottees obtained lots. There were distinct columns for the names and trades of occupiers, number of the lot on the plan, date of original entry, length of lease (all for ninety-nine years), and rent. The sixth column related to the cows' pasturage, specifying the number of cows and the rent. The rent was that set forth in the regulations. There was another column for horse's pasture, an additional privilege having been added since the date of the regulations of half a horse's pasturage. There were columns for peats charged at 2s. 6d., and for the arable and uncultivated land, to which the allottees were entitled under the regulations. The persons obtaining lots had taken possession, and had ever since possessed these lots, and each had performed the obligation of building a house on his lot, had possessed his house, the grazing, the right of digging peats, and paid the stipulated rent. Upon these facts two questions arose—1. How far were the Society bound by these regulations, rentals, and minutes. Being followed by *rei interventus* and possession, these were unquestionably binding on both parties though no formal leases were granted. These documents contained all the essentials of a lease—parties, subjects, rent, entry, and endurance. There was a question whether an ish was not required under the Act, and if so, whether these leases had an ish? There was, however, a specified period of ninety-nine years for which the lease was current and still binding on the proprietor, and it was unnecessary to inquire into the effect of the obligation that the tenant should have the option to renew his lease at the end of the ninety-nine years. The second question was whether the leases thus constituted were binding on Campbell as a singular successor. The Society had sold all its rights at Tobermory, except the quay and pier, to Mr David Nairne in 1845, who sold in 1850 to Mr Alexander Crawford, who in 1856 sold to the pursuer. In these conveyances there were clauses

of warrandice which might be of importance if tenants should demand a renewal at the expiry of the ninety-nine years. But it was enough to ascertain whether the leases were binding on Mr Campbell during the ninety-nine years. It certainly was so as to the principal lots. A right having an ish is rendered a real right binding on a singular successor by possession, which, in a lease, is equivalent to sasine. Here there was a full equivalent to infeftment. The pasture was expressly declared by the regulations, published before the lease was granted, to be a pertinent of the subject of the lease. Each tenant was to have a temporary lease of garden ground, but a right of pasturage and peats without any termination. But besides the tenants who stood on the original regulations and the rentals, a second class of defenders had got regular leases. They could not be in a worse position than the former class, and were also entitled to succeed. There was more difficulty as to a third class, who had obtained feu-charters. That gave them unquestionable right to all the subjects contained in the charters. They paid feu-duties instead of rent, their rights never would come to an end, and it was not in their option to relinquish them. In the feu-charters, however, certain privileges were granted, but no pasturage; and his Lordship thought it was intentionally omitted. This was made clearer by the reddendo, which included the rent for other subjects, but not the 5s. for the pasturage. There was no express renunciation of the right vested in the tenants under the leases, and the difficult question was whether the obtaining of the feu-right implied the extinction of the subordinate right of lease. His Lordship could not see any incompatibility in the tenant obtaining a higher right, and continuing to hold his right of lease during its continuance. In the law of Scotland, two titles of possession might be vested in the same person. Even in feudal rights, the *dominium directum* and the superiority might be held by one person (Bald *v.* Buchanan, M. 15084, 2 Ross. L. C. 210). Tenants of teinds might also acquire the titularity, and the one right did not extinguish the other (E. of Fife *v.* Innes, 1809, Hume 468). On principle, his Lordship should have great difficulty in holding that the tenants had lost the rights previously vested in them. But the authorities were the other way; and he must yield to the united weight of Craig (ii. 10, 7), Stair (ii. 9, 36), and Erskine (ii. 6, 44). The result was that the feuars had no right of pasturage; but in other respects the pursuer had failed.

The other Judges concurred.

Act.—Advocatus, Fraser & Gifford. Agent—J. Dalgleish, W.S.—— Alt.—Decanus, F. W. Clark & Black. Agents—J. Y. Pullar S.S.C., and Carror & Couper, S.S.C.

KENNEDY *v.* M'DONALD.—*March* 8.

Proof—Circumduction.

In approving the tenor of the settlement of the pursuer's mother, the late Mrs M'Donald of Lassintullich, which the testator was alleged to have destroyed when in a weak and facile state of mind, and under the influence of the defenders, her other children,—circumduction opened up and the pursuer allowed a further limited term for proving, she having been unsuccessful on her application for the poor's roll, in consequence, as she averred, of the want of a sufficient quantity of evidence, which her poverty had prevented her from producing; and a benevolent lady having since come forward to guarantee the expenses of the litigation.

Act.—A. Nicolson. Agent—J. P. Coldstream, W.S.——Alt.—Fraser. Agent—J. Galletly, S.S.C.

PET.—ROY *v.* HAMILTON & Co.—*March* 9.

Merchant Shipping Act (17 & 18 Vict., c. 104, sec. 65.)

Roy presented this petition under the Act 17 and 18 Vict., c. 104 (Merchant Shipping Act, sec. 65), praying to have the respts., merchants in the African trade in Glasgow, interdicted from transferring or mortgaging four ships, of which they are the registered owners, in prejudice of his rights as their creditor. Roy had been in their service as clerk or agent on the coast of Africa, and had raised an action against them for sums alleged to be due to him by them as commission and otherwise, in which a proof was now proceeding. He averred that the respts. were *vergentes ad inopiam*, and were making arrangements to transfer the property of the ships in question before they could reach this country, and before he would have it in his power to attach them by arrestment. In these circumstances he contended that he was entitled to the remedy provided by sec. 65 of the Act. Respts. objected that the petition was incompetent, that remedy not being applicable to the circumstances.

LORD PRESIDENT. The petitioner was nothing more than a personal creditor of respts., whose claim was disputed. The petition applied to four ships, which, he said, were all beyond the jurisdiction of the Court, he could not say where. He further averred that it was respts'. intention to transfer these ships before their arrival in this country, whereby his security would be defeated. That was his whole case, and on the same statement he would, according to this construction, be entitled to attach any number of ships belonging to any person whom he alleged to be his debtor. It was an attempt to use the sec. of the Act for a purpose not contemplated by the Act, by a party not within the scope of its provisions, and in a manner and form totally unauthorised by the Act. Sec. 65 was in the part of the statute relative to registry, and formed part of the subdivision entitled "transfers and transmissions." Sec. 62 dealt with the case of a British ship coming by death or the marriage of a female proprietor to belong to any person not qualified in terms of sec. 18 to be owner of a British ship. Such person could not take up the legal estate in the ship or share, and the statute allowed application to be made to the Court to order a sale, the proceeds of which are to be paid to the person so entitled. Sec. 53 provided for carrying out such sale, viz., by the Court appointing a nominee, who shall be entitled to transfer the ship or share to the purchaser. Sec. 64 limits the time within which such application must be made under the penalty of forfeiture. A very wide discretion was conferred upon the Court. It seemed to be contemplated that when an unqualified person came to be in right of a British ship or share of a British ship, the order should be granted at once. It was to be a summary and rapid proceeding. But it would naturally occur that persons might in some cases have a title to interfere in the course of this summary proceeding; and this was the case for which sec. 65 was intended to provide. "Such ships" were those referred to in the preceding sections, the beneficial right to which had vested in unqualified persons. His Lordship would not attempt even any illustration of the word "interested," which was of very extensive meaning. The prohibition was to be for a limited time, plainly

a sufficient time for inquiry into the merits of the claim or objection of the party so interested. The petition should therefore be refused as incompetent.

The other Judges concurred.

Act.—Young and Harry Smith. Agent—John Henry, S.S.C.——Alt.—A. Moncrieff and Gloag. Agents—Burn, Wilson, & Gloag, W.S.

MARTIN *v.* MARTIN.—*March* 12.

Agent and Client—Lien—Aliment—Expenses.

In this action by a wife against her husband for interim aliment, the Sheriff (Alison) found that the proof established *sævitia*, that the wife was justified in leaving her husband, and decerned for aliment and expenses,—the husband's defence being an offer to take back the wife to his house. Lord Jerviswoode, in the advocation, affirmed. The First Division, on reclaiming-note (21st June), found that acts of cruelty on the part of the defender had been proved, decerned for interim aliment and a sum of expenses *ad interim*, and *quoad ultra* superseded consideration of the cause until November, that the pursuer might bring an action of separation, in which the Court might permanently determine the rights of parties. Meanwhile the pursuer returned to her husband, so that the cause could not proceed further. The wife's agents, Messrs Macgregor & Barclay, then craved to be sisted, and moved for decree for their expenses as agents-disbursers. The husband opposed, on the ground that the cause was not at an end. (Authorities—*Hamilton* v. *Kay*, 29th Nov. 1854, 17 D. 107; *Murray* v. *Kyd*, 14 D. 501; *Hamilton*, 17th June 1813, F.C.; *Cheyne*, 10 S. 202; 1 Lush's Prac. 301-303; 2 Bell's Com. 39; *Tod & Wright*, 1 S. 381.)

LORD PRESIDENT. The claim was made under unusual and perhaps new circumstances. On principle, there was no doubt that the pursuer's agents were entitled to an award and decree for the expenses disbursed by them. The difficulty suggested, that the action was not finally disposed of on the merits, might be obviated. The interlocutor of June last substantially decided the action in favour of the pursuer. It was an action for interim aliment, and nothing else; otherwise, it would not have been competent in the Sheriff Court. When that interlocutor was pronounced it was quite in the power of the Court to find the pursuer entitled to expenses, and allow decree to go out in the name of the agents. Since that time no change had taken place in the relative position of the parties so far as this question was concerned, except that the pursuer was not now represented in the action. In point of form, the interlocutor might bear to be in respect that no appearance was now made for the pursuer, and that it was alleged by the defender that the pursuer was now living with him, and the action was therefore virtually at an end.

Lords CURRIEHILL and ARDMILLAN concurred.

Lord DEAS also concurred, holding that the pursuer had discharged the action by returning to live with her husband.

Act.—Fraser and Gebbie. Agents—Macgregor and Barclay, S.S.C.——Alt.—R. V. Campbell. Agents—Neilson & Cowan, W.S.

COLVIN *v.* DIXON.—*March* 15.

Principal and Agent—Iron Warrant—Sale—Reparation.

Action against the firm of Wm. Dixon ironmaster and coalmaster at Govan, concluding for £3500, as damages sustained by pursuer through defenders' failure to deliver to him a quantity of pig-iron in terms of their obligation to that effect. The pursuers averred that, on or about 16th May 1866, he purchased from Campbell Brothers, iron-brokers, 1000 tons pig-iron, at 53s. 6d. per ton, terms cash on the day of sale, against makers' orders to deliver; that, in implement of this contract, the pursuer same day paid Campbell Brothers £2675, being the price of said iron, and received from them in exchange, and in the ordinary course of business, a certificate or obligation granted by the defenders and their firm of William Dixon in the following terms:—

"Glasgow, May, 16, 1866.

"I hold to the credit of William Colvin, Esq., 1000 tons pig-iron, mixed numbers, Calder or Govan brands, in my option, and will deliver the same on demand.—For William Dixon, JOHN CAMPBELL."

He averred further that Campbell was the manager employed by the defenders to conduct in Glasgow the pig-iron department of their business, and he was authorised by the defenders to grant such certificates or obligations; that he had been in the habit of granting such certificates or obligations, which were always duly implemented by the defenders; that he was the only person known to the trade as selling Dixon's pig-iron; and that the obligations of the said nature granted by the said company or firm were invariably signed by him for the firm, and the trade, as the defenders well knew, took and recognised them as the obligations of the defenders.

The defenders maintained that these statements did not amount to a relevant statement of authority on Mr Campbell's part to grant the obligation, and averred that it was granted by Campbell to Campbell Brothers (his sons) fraudulently and gratuitously; and they maintained that there was no averment by the pursuer that Campbell had authority to grant gratuitous obligations for the delivery of iron.

Held that the defenders' contention was well founded, and action dismissed as irrelevant. There was no averment on record that this obligation was granted by Campbell in pursuance of any contract of sale, or other contract or transaction; and that being so, it must be assumed that the obligation was gratuitous, and there was no averment, express or implied, upon record that Campbell had authority, as manager or otherwise, to grant and subscribe gratuitous obligations for delivery of iron. Opin. per Inglis, Pres., that, even if the document had been signed by William Dixon, the absence of any statement as to the manner in which it came into the hands of Campbell Brothers would have been fatal to the pursuer's case.

Act.—Clark and Gifford. Agent—James Webster, S.S.C.——Alt—Young and W. M. Thomson. Agents—Melville and Lindsay, W.S.

SECOND DIVISION.

PAUL *v.* HENDERSON.—Feb. 19.

Decree-Arbitral—Unexhausted Submission—Order for Payment.

Reduction of a decree-arbitral. Upon the plea that the decree was not exhaustive of the submission, the Court were equally divided, and the point was argued before three Judges of the First Division, sitting with their Lordships of the Second Division.

The parties had submitted the whole subject-matter of an action of count and reckoning at the instance of Paul against Henderson to the late accountant of Court. Henderson consigned L.15 in bank to await the orders of the arbiter. The arbiter found the amount of the balance due by Henderson to be L.19, 19s., but pronounced no order for the uplifting of the consigned money.

LORD CURRIEHILL thought the objection ought to be repelled. The arbiter was in this position, that he might competently have gone to the bank and paid the money to the party entitled. He did not do so, but he found by his decree that the debtor was addebted in L.15 on his own admission, and in L.4 more which he had not admitted; and found that the balance against him was L.19, 19s., under deduction of L.15 "consigned by said David Henderson in my name as arbiter." It must be presumed he intended to exhaust the submission, as the decree was obviously final; and, though the words might be ambiguous, he thought he had done so. An order to enable the party to obtain the consigned money could not with propriety be made in a decree-arbitral. It would have been still competent to grant such an order after the final decree, for it would not have been an act in the submission (Erskine, July 30, 1814); but no such order was necessary.

LORD NEAVES thought the reason of reduction ought to be sustained. The arbiter, to whom the summons, whole conclusions, and all defences of the lawsuit had been referred, ought to have given an order which would certiorate the bank to whom they were entitled to pay the money. He only decerned for the difference between the total balance and the consigned sum, and not for the consigned sum itself. The decree contained a reservation "saving and reserving to the said David Henderson all right he may have to set off or retain the said sum for expenses hereinafter found due to him." His Lordship thought the sum meant was the L.15, and that was turning over the question who had right to it to some unknown tribunal. That question could not be settled in an action for decree conform. The Court could not go beyond the final decree of the arbiter, and he had left the L.15 *in medio*, reserving and not deciding the question to whom it belonged.

The Lord President, and Lords Cowan, Benholme, and Ardmillan concurred with Lord Curriehill.

The Lord Justice-Clerk concurred with Lord Neaves.

Act.—Pattison, F. W. Clark, Arthur. Agent—Thomson Paul, W.S.
—Alt.—D. F. Moncreiff, Orr Paterson. Agents—J. & A. Peddie, W.S.

PIRIE & SONS *v.* WARDEN AND OTHERS.—*Feb.* 20.

Sheriff Court—Jurisdiction—Locus solutionis—Maritime Cause—Foreigner —1 Geo. IV. c. 69—2 *Vic.* c. 119.

The pursuers sued the defender, in the Sheriff Court of Aberdeenshire, "as owner, or representing the owner or owners, and as masters" of the Emily and Jessie, of Liverpool, for delivery of a cargo of esparto, shipped at Aquilas, in Spain, conform to bill of lading signed by the defender, and endorsed to and held by the pursuers, and for damages. The averment was that the defender was bound to deliver the cargo to the pursuers at Aberdeen. He was personally cited there. No arrestment was used to found jurisdiction. It was admitted that the defender was a foreigner, with no domicile in Scotland. The preliminary defence of no jurisdiction was stated, and sustained by the Sheriff-Substitute and Sheriff. The pursuers advocated, and pleaded that the jurisdiction was well founded, in respect that Aberdeen was the *locus solutionis* under the bill of lading, and that the defender was personally cited there. Further, the cause being maritime, they founded on the statutes (1 Will. IV., cap. 69, and 1 and 2 Vict., cap. 119) under which the Sheriffs have Admiralty jurisdiction. The defender pleaded that, being a foreigner, and no arrestment to found jurisdiction having been used, he was not subject to the Sheriff's jurisdiction. He contended that the Act 1 and 2 Vict. restricted the jurisdiction conferred by the Act of Will. IV. to cases in which the defender would have been subject to the Sheriff's jurisdiction in a civil cause before the Act of 1 Will. IV. was passed.

The LORD JUSTICE-CLERK, after stating the nature of the question at issue, said that the Act 1 Will. IV., cap. 69, which abolished the High Court of Admiralty, besides conferring Admiralty jurisdiction on the Court of Session, enacted that Sheriffs should have original jurisdiction in all maritime causes both civil and criminal, "including such as may apply to persons furth of Scotland," of the same nature as that formerly held by the Admiralty Court. The Act 1 and 2 Vict., cap. 119, was to remove doubts as to the extent of the Sheriff's jurisdiction. It declared the meaning of the former Act to be that Sheriffs should have jurisdiction in maritime causes "provided the defender shall, upon any legal ground of jurisdiction, be amenable to the jurisdiction of the Sheriff before whom such cause or proceeding may be raised." That could not be read as repealing the clause in the former Act as to persons furth of Scotland. It only required that they should, on a legal ground of jurisdiction, be amenable in the Sheriff Court. Here the ground relied upon was that the *locus solutionis* of the contract concurred with personal citation within the territory. That was a good ground in the Court of Session. Was it equally so in the Sheriff Court? It was so in the case of a Scotchman domiciled in a different Sheriffdom (Logan, Jan. 1859, 3 Irv. 323.) He thought the principle applied equally to foreigners, especially looking to the statutes. Foreigners were those "furth of the country." No doubt, the Supreme Court was rightly considered as the *commune forum* of foreigners as a class—those who were out of the country, and who, as a general rule, could only be cited edictally. But there were various ways in which a foreigner became subject to the jurisdiction of the Sheriff. In some cases, he became so by a residence for forty days within his territory. In this case, he was found in the place where and at the time

when he was bound to perform the contract. He thought the jurisdiction was well founded.

Lord Cowan concurred. There was no reason why jurisdiction over foreigners should be confined to the Supreme Court, when edictal citation was not necessary. It might frequently involve a denial of justice. He considered the case of a Scotchman from another Sheriffdom *a fortiori* of the present, because he might be convened in his own county; and even if the case of Logan had been otherwise decided, he would not have held it to rule the present case.

The other Judges concurred.

Act.—Clark, Keir. Agent—James Webster, S.S.C.——Alt.—Young, Gifford. Agents—Cheyne & Stuart, W.S.

Robertson or Anderson and Others *v.* Murdoch and Others.—*Feb.* 21.

Delivery of Deed.

This action concludes for declarator that a deed executed in 1856 by the late Andrew Robertson was an effectual disposition of certain heritable subjects in favour of the pursuer, Mrs. Anderson, and for delivery of the deed. The granter had previously in 1854, executed a *mortis causa* disposition, which conveyed the subjects in question to Mrs Anderson, who was a married woman, the natural daughter of his brother; but that was subsequently destroyed. It was averred by the pursuers that Robertson made the disposition from a wish to give his niece the immediate benefit of the subjects. It conveyed them to her in liferent and her children in fee, with entry at Whitsunday 1856. It was never delivered, and contained no clause dispensing with delivery, but remained in the repositories of the granter till his death in 1865. A proof by commission was taken, and the pursuers relied upon various circumstances as instructing that, after the disposition, Anderson held the property for behoof of his niece. He took a policy of fire insurance in her name, and entered the subjects in her name in the books of the assessor of the burgh. The Lord Ordinary assoilzied the defender. The pursuers reclaimed; but the Court adhered.

The Lord Justice-Clerk said that it was true that actual delivery was not always essential. The cases in which the Court had considered that not to be essential were either those where delivery was not required or those where the granter was considered to be holding the deed for the benefit of the grantee. It was sought to bring the present case within the latter category. But the cases of that class had always occurred where the granter was the natural custodier for the grantee—as the head of a family for his wife or pupil or minor children. Here the grantee was a married woman, and her husband was the natural custodier for her. It would be difficult, in such a relation of parties, to show that the granter was holding an undelivered deed for the grantee, but certainly no such case had been here made out.

The other Judges concurred.

Act.—Pattison, Strahan. Agent—James Paris, S.S.C——Alt.—Scott. Agents—Watt & Marwick, S.S.C.

MP.—MONTEATH DOUGLAS' TRUSTEES *v.* DOUGLAS AND OTHERS.—*Feb.* 21.

Unextracted Decree—Executor—Decree of new.

In this action, a claimant, Miss M. Monteath, obtained decree in 1862, authorising and ordaining the trustees to make payment to her of her claim on the estate of the late Mr A. D. Monteith, no objections thereto being stated. She died in 1865 without having extracted the decree. Her sole executor moved the Court to sist him as a party, and pronounce decree of new. The judicial factor on the trust-estate opposed, on the ground that it was doubtful whether the fund *in medio* was sufficient to meet the claims. The Lord Ordinary sisted the executor, but refused the motion *quoad ultra*.

The Court unanimously recalled this judgment, and pronounced decree of new. The decree was final and *in foro*. The matter was *res judicata*. It was too late for the trustees or the judicial factor to oppose the decree, as they had not done so at the proper time.

Act.—Burnet. Agents—Lindsay & Paterson, W.S.——Alt.—Adam. Agents—Lindsay & Howe, W.S.

M'TAGGART *v.* M'DOUALL.—*March* 1.

Property—Lateral Boundary on Foreshore—Servitude of Seaware.

Both pursuer and defender were proprietors of adjoining estates on the west side of the Bay of Luce. The conclusions were for declarator that, as proprietor of the lands and barony of Ardwell, the pursuer has exclusive right to the wrack, ware, and waith growing or drifted upon the shores adjacent to and *ex adverso* of his lands up to a line extending from certain march stones erected at the termination of the land boundary between the estates of the parties to a stone called the Caughie stone, situated below low-water mark; or otherwise up to another line further north than the first-mentioned line drawn from the said march stones, and running to the south of an erection upon the sea-shore known as the Ardwell Fishyards. The defender, whose lands lie to the south of the pursuer's, and are also held under a barony title, claimed a different line of boundary running further north across the foreshore, alternatively either the line of the land boundary produced, or a perpendicular dropped from the said march stones upon what he called the *medium filum* of the Bay of Luce. Both parties relied both on their legal rights as proprietors on the seashore and on immemorial possession; and the defender also contended that, even if the boundary were fixed to be either of the lines contended for by the pursuer, he had acquired by prescription a servitude of gathering wrack and ware beyond the march. The Lord Ordinary (Kinloch) dismissed the action as laid on the ground that the pursuer, who averred that the true legal line lay to the south of the Caughie stone and did not allege that either of the lines concluded for in the summons was the true legal line, had not properly raised the question as to his legal rights, and that the proof as to possession (even if possession in such a case could be competently founded on to constitute a right) was conflicting and unsatisfactory. His Lordship stated his view as to the proper mode of laying down a lateral boundary across the foreshore, holding that the rule, founded on the analogy of the case of Campbell *v.* Brown, 18th November 1813, F.C., was to take a line out at sea, showing

the average direction of the sea coast, and to drop a perpendicular on that from the end of the land boundary.

Both parties reclaimed.

At advising on 21st June 1866, the Court recalled the Lord Ordinary's interlocutor, as proceeding on too narrow and technical grounds, and adopted the general principle as to such lateral boundaries stated by the Lord Ordinary; remitted to Dr Keith Johnston to lay down a line representing the average direction of the sea-coast, and a perpendicular drawn to it from the end of the land boundary, with leave to lay down such other lines as the parties should suggest, or as should tend to elucidate the points at issue. An elaborate report was made by Dr Johnston, illustrating, on scientific principles, the whole question as to lateral boundaries on the foreshore, and tending to show, *inter alia*, that the principle adopted by the Court was erroneous or at least inadequate. The Court, after further argument, especially as to the question what length of coast should be taken into account in taking the average coast line, remitted to lay down an average coast-line from a point on the west side of the Bay three miles south of the march to a point about six miles north of it; and to drop a perpendicular upon the line so drawn. A remit was subsequently made to lay down the Fishyards, and it appeared from the last report that the line last drawn cut off one-eleventh part of the area of the fishyards from the pursuer, and thus ran a very short distance to the north of the line claimed in the alternative conclusion of the summons. Objections to this report were lodged by the defender, but were repelled. The pursuer contended that the proof showing the fishyards to have been built and used for catching fish by his predecessors, and that, the difference between the line running to the south of them and the line last laid down by order of the Court being so trifling, he was entitled to decree in terms of the second conclusion.

Lord Benholme.—There was nothing to prevent the red line laid down under the remit being adopted as the boundary, provided, on consideration of the proof, no element emerged leading to a different result. The pursuer did not in his summons claim more than his legal rights *ex adverso* of his property; he did not claim to have acquired anything beyond by prescription. The defender did claim to have acquired a servitude right beyond his legal boundary. This right on the proof presented two aspects—as a right of cutting seaware for kelp, and of gathering or cutting it for the purposes of the estate. The former was inconsistent with the nature of a servitude, as it had nothing to do with the advantage of the dominant tenement, but was a mere means of obtaining mercantile advantage. But when the manufacture of kelp came to an end on the introduction of Spanish barilla, the sea-ware was applied to a new use in connection with the turnip husbandry, a use which was consistent with the nature of a predial servitude. Other considerations, however, induced his Lordship to doubt whether the privilege of gathering sea-ware could be reckoned a servitude. That privilege might be acquired by grant, but it was questionable whether a right of going upon the lands of a neighbouring proprietor for the purpose of taking up what was waif and stray, was a proper servitude. It was unnecessary, however, to say more, as the proof did not show sufficient grounds for such a contention. There had, in fact, been no peaceable possession of a servitude. On the whole, there was nothing to induce the

Court to interfere with the legal line of march between the parties. As to the legal line, there was no absolute authority for what the Court had directed Dr Johnston to do; but the analogy of previous cases and the reason of the thing supported the view they had taken. An interlocutor would be pronounced with reference to the plan. As to the competency of doing so under the summons, his Lordship could not doubt that the rule of construction of the summons contended for by the defender and adopted by the Lord Ordinary was far too strict. A party might claim more than he was entitled to, but it was for the Court to say how much he was entitled to.

Lord Neaves and Lord Cowan concurred, and it was stated that the late Lord J. C. (now Lord President) concurred.

Act.—Young, Gifford, and Guthrie. Agent—D. J. Macbrair, S.S.C. —Alt.—Advocatus, Shand and Balfour. Agent.—G. Cotton, S.S.C.

HOUSE OF LORDS.

LORD ADVOCATE AND COMM. OF WOODS AND FORESTS *v.* HUNT.—*Feb.* 11.

(In the Court of Session, Jan. 31, 1865, 3 Macph. 426.)

Property—Prescription—Parts and Pertinents.

Action of declarator against Hunt of Pittencrieff, that the royal Palace of Dunfermline belongs to the Crown. The circumstances of the case are set forth in the report in the Court below.

Proof being led, the Lord Ordinary (Mackenzie) found that the defender had no express title to the palace and ground in dispute, and that he was not entitled to plead prescription on the footing that he and his predecessors had possessed the palace and ground as a part and pertinent of the barony of Pittencrieff, or under any other legal title, and therefore that the defender had no legal title to the palace. On a reclaiming note, the Lord President (M'Neill), Lords Curriehill and Ardmillan, came to the contrary conclusion; for though he had no express title, his possession for forty years on a barony title, with parts and pertinents, was sufficient. Their Lordships held that the boundaries of the express title did not include the subjects; and that the fair presumption was that the possession had been upon the barony title, which was sufficient, and not upon the bounding title, which was insufficient. Lord Deas dissented.

The pursuer appealed. The case was argued in July 1866, and judgment was reserved.

LORD CHANCELLOR CHELMSFORD. The suit was instituted by the Lord Advocate on behalf of the Crown, and claimed originally a larger portion of ground than was afterwards the subject of dispute. Declarator was sought that the defender (respondent) had no legal right or title to the Royal Palace of Dunfermline, or ruins thereof, or ground whereon the same is situated, and immediately adjacent thereto, lying between the wall or road on the south of the said ruins, running down to the Heugh Mills on the one side, and Monastery Street on the other side. The defender alleged that the whole of the ground formed part of the policy of the

barony of Pittencrieff from time immemorial, and had been possessed and enjoyed under the titles to the said subjects, under express title, or as parts and pertinents of the barony. The appellant objected that the respondent could not plead alternatively forty years' possession under a special title, and a possession as part and pertinent of the barony of Pittencrieff. But all the Judges saw no objection to this. The defence, however, was really narrowed down to the latter; for all the Judges thought the special title was entirely out of the question. As to the other defence—the possession of the Palace grounds for forty years and upwards—no doubt such possession had been had. The Act 1617, however, clearly shows that the possession must begin with a title, and must continue for forty years continuous. The title may have been infirm, or it may not have expressly mentioned the subject claimed, but forty years' possession would cure it. The thing claimed is comprehended under the term parts and pertinents. But in such a case it will not be sufficient to prove that the alleged pertinent has been occupied with the principal subject; it must be occupied as belonging to such subject. Objections were made by the appellant to the possibility of the ground in dispute being part and pertinent of the barony of Pittencrieff. It was said to be discontiguous, but that objection may be overcome by evidence. Again, it was said that a royal palace could not be prescribed; and he (the Lord Chancellor) thought the appellants' view to be the right one on that point. Even assuming that the ground was *inter regalia*, this would not be a conclusive objection to the respondent's prescriptive claim, although it might render proof of it much more difficult. It was competent to the Crown expressly to annex the palace-ground to the barony, but it was very doubtful if such ground would pass as "parts and pertinents" to a principal subject with which it had never been previously connected. But, waiving that point, and taking the respondent's title to the barony of Pittencrieff as the only habile title, then it was necessary to examine the different charters and titles to see if this ground was ever included as a part and pertinent. It was clear the palace originally did not belong to the barony when the original charter was granted in 1538, for it was then part of the possessions of the monastery of Dunfermline. On viewing the successive titles it was scarcely possible to believe that the palace ever was made part and pertinent of the barony; and it was inconceivable that no mention should have been made of such an important subject if it had been so included. A close examination of the charters led to the conclusion that they had a negative and excluding force with respect to the Palace being part and pertinent of the barony. Upon the whole case the respondent was unable to show a charter of the ground in dispute, and to prove that it was ever held as part and pertinent of the barony of Pittencrieff, and therefore he failed to defend himself against the claim of the Crown. The Crown having originally made a claim beyond what in the result it appeared to have been entitled to, there ought to be no costs on either side.

Lord Cranworth said the question was reduced to this—Had the respondent satisfied the House that between 1669 and 1803, which was the date of the charter under which he claimed this piece of land on which are the ruins of the Palace, had ceased to be the property of the Crown and had become part and pertinent of the barony of Pittencrieff? The law of Scotland required that, to establish a title by prescription, not

only the party insisting on it should prove possession for forty years, but also should show a proper feudal title on which his possession had rested. The respondent had failed to do this. It no doubt was natural that when Lord Tweeddale had disposed of all that was valuable in what he had acquired at Dunfermline, he would not as Constable be disposed to keep the Palace in repair. And nothing could be more probable than that a neighbouring proprietor, on whose lands the ruins abutted, should try to include them in his policy, treating them almost as derelict property. There was nothing in this improbable, or indeed very blameworthy, But looking to all the documents, his Lordship felt compelled very reluctantly to say that the respondent had not satisfied him that he had any charter such as to enable him to insist on a right by prescription. Reversed.

Act.—Sir H. Cairns, Q.C. (Att. Gen.), Anderson, Q.C., and T. Ivory—— Alt.—Sir R. Palmer, Q.C., and Lee.

HIGH COURT OF JUSTICIARY.

SUSP.—MORTON *v.* GORDON & JOHNSTON.—*March* 11.

Procurator Fiscal—Warrant to Apprehend.

Suspension of conviction under the Day Poaching Act, in Nov. 1865, under which, on 8th Jan. 1867, suspr. was incarcerated. The principal grounds of suspension were that the Procurator-Fiscal had not authorised the incarceration; and that the minister of the parish to whom the penalty was ordered to be paid was dead, so that there was no one in existence to whom the penalty could be paid. The apprehension had been at the instance of the Superintendent of Police. Suspension refused. The Superintendent of Police had power to enforce the warrant, and the Procurator-Fiscal being *functus* when sentence was pronounced, had no option as to enforcing the conviction or not. The same rule applied where there was a private prosecutor who had as little right as the public prosecutor to interfere with a sentence once pronounced. He might decline to exact expenses though he could not interfere with the penalty.

Act.—Pattison. Agent—J. Somerville, S.S.C.——Alt.—Sol.-Gen. Millar, A. Blair, and Scott. Agents—Hunter, Blair and Cowan, W.S. and W. S. Stuart, S.S.C.

ENGLISH CASES.

LIEN—*Excluded by express contract—Consignee of West Indian Estates.*—"The right of lien is not the result of an express contract; it is given by implication of law. If, therefore, a mercantile relation which might involve a lien is created by a written contract, and security given for the result of the dealings in that relation, the express stipulation and agreement of the parties for security exclude lien, and limit their rights by the extent of the express contract that they have made. *Expressum facit cessare tacitum.* If a consignee of West Indian estates takes an express security, it excludes a general lien. The ordinary mercantile character and position of a consignee of a West Indian plantation is this—The custom of the mercantile world is to select as consignee a merchant residing in this country, to whom the whole produce of the plantation is consigned, and who, in return for that produce, accepts bills drawn upon him by the proprietor or manager in the West Indies for island contingencies; and who, according to the orders of the manager or proprietor, purchases the supplies needed for the estate, and sends

them over to the island. There is no necessity in a case of this kind that there should be any contract for the purpose of determining the right of the consignee. His right, as it is supposed to be established by decision, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to principal and agent." Per *L. Westbury*. By indenture of mortgage, L. & L., in consideration of advances by the respondents, mortgaged West Indian estates to the respondents. The deed contained covenants by L. & L. to make annual consignments to the respondents. By another indenture of mortgage L. & L., in consideration of advances by the appellant, mortgaged certain other West Indian estates to the appellant; and by another indenture of consignment, covenanted to consign to the appellant two-thirds of the produce of the estates mortgaged to the respondents so long as the mortgages to the appellant should continue :—*Held*, that the appellant was not a consignee of the estates so mortgaged to the respondents so as to be entitled to a general lien on such estates as such consignee. *Chambers* v. *Davidson*, 36 L. J., P. C. 17.

CONTRIBUTORY—*Companies' Act*, 1862.—The subdivision of the shares of a company, limited by shares, registered under the Act, is illegal; but the transferees of the subdivided shares are liable to be placed on the register of the contributories of the company. *Semble*—the creditors of the company are not bound by such subdivision, but may elect to have either the original shareholder or the transferees of a share so illegally subdivided put on the list of contributories. Per *Romilly*, M. R. *Financial Corpn.* (*Lim.*), *ex parte Holmes*, 36 L. J., Ch. 87.

CONTRIBUTORY—*Married woman—Separate estate.*—A woman, entitled to shares in a banking company, married, and by marriage settlement the shares were vested in trustees for her separate use. The bank dealt, both as to the shares and otherwise, with her alone, as absolutely entitled to separate estate, and, on her application, fifteen new shares were allotted to her in respect of the settled shares, she paying for them by her own cheque on her separate account at the bank. Upon the winding-up of the company—*Held*, per *Kindersley*, V.C., that she was rightly placed on the list of contributories as to these fifteen shares in respect of her separate estate; that the contract, being mutually made with reference to and on the credit of her separate estate, would bind her separate estate if made with an individual; that it was equally possible for her so to bind her separate estate by contract with a company; and that, even if there had been anything in the company's deed of settlement which would justify the shareholders in upsetting the contract, she could not herself repudiate it. *In re Leeds Banking Co., ex parte Matthewman*, 36 L. J., Ch. 90.

RAILWAY COMPANY—*Lien for unpaid purchase-money.*—A railway company purchased land, took possession and constructed the railway, part of the purchase money remaining unpaid. They subsequently leased their line to another company. Upon a bill by the landowner to obtain payment of the unpaid purchase-money, asking for an injunction to restrain both companies from using the line—*Held*, aff. dec. of *Stuart*, V.C., that such injunction might be granted, to be put in force if the money should not be paid within a fortnight. *Cosens* v. *the Bognor Rail. Co.*, 36 L. J., Ch. 104.

FIXTURES.—The question whether an article is a personal chattel or a fixture does not depend on whether the article is or is not easily removable, but on whether it is or is not a part of the building from which it is proposed to remove it. Applying this principle in a question between the personal representatives of a tenant for life and a remainder man—*Held*, per Romilly, V.C., that tapestries and figured satin put up in frames on the walls of a room were part of the wall, and therefore fixtures, though they might have been removed without damage, and the place supplied by paper; but chimney-glasses, ornamental frames, and pictures, held not to be part of the wall, but ornaments attached to it, and removable. *D'Eyncourt* v. *Gregory*, 36 L. J., Ch. 107.

CONTRIBUTORY—*Companies' Act*, 1862—*Registration of transfer* —The omission by directors to register a transfer of shares at one board meeting passed, is unne-

cessary delay; and the name of a person which is on the list of contributories through such delay will be struck off, under sec. 35. The Court will not in such a case consider the state of the affairs of the company at the time when the registration ought to have been completed. *Shepherd's case*, *ante* p. 117, 36 L. J., Ch. 32, 2 L. R., Ch. Ap. 16, commented on by Romilly, M.R. *In re the Joint-Stock Discount Co.* (*Lim.*), *ex parte Nation*, 36 L. J., Ch. 113; 3 L. R. Eq. 77.

COMPANIES' ACT, 1862—*Contributory.*—Where shares are sold, and the purchaser has not got the transfer registered, if the vendor has not taken steps to get the purchaser's name placed on the register, his own must remain in winding up. Besides the vendor and purchaser, the Court has to consider the interest of the general body of shareholders; hence it does not follow, because a vendor could enforce specific performance of a contract to take shares in a company, that he can have the purchaser's name substituted for his on the list of contributories. *In re the Contract Corporation; Head's case; White and Holmes's case*, 36 L. J., Ch. 121; 3 L. R. Eq., 84.

COMPANIES' CLAUSES ACT, 1845—*Calls.*—Sec. 16 of the Act enacts that "No shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." H., as holder of 133 L.25 shares in a railway company, had allotted to him in respect thereof 66 new L.10 preference shares. Calls were made on both sets of shares. Those on the latter set were paid, the shares being fully paid up, but the calls on the L.25 shares were never paid. The L.10 shares were afterwards converted into stock and sold by H. to the plaintiff. The company refused to register the transfer, on the ground that calls were still due on the L.25 shares. *Held*, that the L.10 shares having been fully paid up and converted into stock, the company had no power to prevent H. from transferring them to the plaintiff, but were bound to register the transfer. *Hubbersty* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.*, 36 L. J., Q. B., 33; 2 L. R., Q. B., 59.

FORESHORE—*Boundary of Parish.*—The boundary of a parish extended along the course of a tidal river. There was nothing to show whether the township did or did not extend beyond the ordinary high water-mark. Docks were constructed on the foreshore, the land being reclaimed, so that the tides no longer flowed over it. *Held*, that the occupiers of the docks were not liable, in respect of this part of the foreshore to the highway rates of the township, as a tidal river must be regarded as an arm of the sea, and its foreshore, in the absence of evidence to the contrary, as extra parochial. *Bridgewater Trustees* v. *Bootle-cum-Linacre*, 36 L. J. Q. B., 41; 2 L. R. Q. B., 4.

MARINE INSURANCE—*Constructive total loss.*—Where, in an action against an insurer on a marine policy of insurance of goods, as for a total loss, it appears that the goods, in consequence of the perils insured against, are lying at a place different from their destination, damaged, but in such a state that they can at some cost be put in such a state that they may be carried to their destination, the jury, in determining whether it is practically possible to carry them on (that is, whether, according to the rule in *Moss* v. *Smith*, 19 L. J., C. P. 225, to do so will cost more than it is worth), should take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods, but they ought not to take into account the fact, that if they are carried on in the original bottom, or by the original shipowner in a substituted bottom, they will have to pay the freight originally contracted to be paid, that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not; and (see *Rosetto* v. *Gurney*, 11 C. B. 176; 20 L. J., C. P. 257), where the original bottom is disabled by the perils of the sea, so that the shipowner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of the cost above that which would have been incurred if no peril had intervened. *Farnworth* v. *Hyde* (Ex. Ch.), 36 L. J., C. P. 33.

PRESCRIPTION—*Immemorial Custom—Rankness.*—From 1808, for more than fifty years, on every marriage in the parish church of H. a fee of 13s had been paid (viz., 10s to the rector and 3s to the clerk) uniformly, except that in a few instances the fee paid was slightly larger, and in one instance less. There was no evidence as to the practice before 1808. A special case, stating these facts, from which the Court were to draw all inferences of fact, raised the question, whether this or any fee was legally due on every marriage:—*Held*, by Cockburn, C.J., Mellor, J., and Lush, J., that no fee was legally due, because looking to the value of money in the time of Richard the First, such a fee could not possibly have been exacted at that time; and, therefore, it could not now be claimed, the principle on which a modus is held bad for rankness being applicable. [Where there is a partial exemption from tithes or a composition for tithes established by a custom of paying something less than one-tenth of the annual produce, such customary mode of tithing is called a *modus decimandi*, or simply a *modus*, Stephen's Com. III. 86-88.] *Held*, by Blackburn, J., that there was evidence of the usage on which a jury would be warranted in finding that the fee was taken before legal memory, and that the amount of the fee was not sufficient to rebut it. Per Cockburn, C.J.—"It is clear that a fee on the celebration of marriage in a parish church can only be claimed by virtue of an immemorial custom in the parish And the question is whether the evidence establishes the existence of a custom for the payment of this fee from the time of living memory. Taking it that the custom to pay the fee now claimed is shown to have existed since 1808, it would *prima facie* follow, according to the established rule, that we ought to presume the previous existence of the custom for an antecedent period as far back as the time of legal memory. But this rule must be taken with this important qualification, that it can only be applied when the presumption of immemoriality is not rebutted, either by proof of the actual origin of the custom since the time of legal memory, or by its appearing that the custom could not possibly have existed at that time. And it is not material whether the impossibility is shown by extrinsic evidence, or is to be gathered from the nature of the alleged custom itself, as where the amouut of an alleged customary payment is so large as to make it impossible that such a payment can have been established as far back as the reign of Richard I. It seems quite impossible to believe that such a payment (of 13s. on the celebration of each marriage) can have been exacted in the reign of Richard I. Without entering into any speculative discussion it is enough to refer to the Statute of Labourers (Edward III.) to be satisfied that, looking to the rate of wages fixed thereby, the payment of such a fee at that period is altogether out of the question. The question is whether under these circumstances we are to do violence to our consciences, both as judges and as jurymen (for we are judges of fact as well as of law in this case), by holding that this custom dates back to the time of legal memory, when we are convinced that this cannot be the case. I readily admit that a law which requires prescription or custom to be carried back for a period of nearly 700 years is a bad and mischievous law, and one which is discreditable to us as a civilised and enlightened people; but such is the law, and I consider myself bound to administer it as I find it; nor do I feel myself warranted in undermining it or frittering it away by subtle fictions or artificial presumptions inconsistent with truth and fact. The law of England ever has been, and still is, in respect of prescriptive rights in a most unsatisfactory state. The common law admitted of no prescription in the matter of real estate, or of any franchise which was matter of record as not lying in grant. In respect of things incorporeal lying in grant, it admitted of a species of prescription, not upon the ground that possession or enjoyment for a given period gave an indefeasible right, but on the assumption that when possession or enjoyment had been carried back as far as living memory would go, a grant had once existed, which had since been lost. Practically, by this presumption, prescriptive rights were established in respect of matters which lay in grant. Protection, in respect of real estates, after continued and peaceable enjoyment, was effected not by the law being that after possession for a given number of years the right of property should be absolutely acquired, but by the indirect contrivance of debarring the adverse claimant from the benefit of the procedure by which alone

his right could be established. And here, again, our ancestors, instead of fixing a given number of years as the period within which legal proceedings to recover real property must be resorted to, had recourse to the singular expedient of making the period of limitation run from particular events or dates. From the time of Henry I. to that of Henry III., on a writ of right, the time within which a descent must be shown was the time of Henry I. In the 20th of Henry III., by the Statute of Merton, the date was altered to the time of Henry II. Writs of *mort d'ancestor* were limited to the last return of King John into England, writs of *novel disseisin* to the time of the King's first crossing the sea to Gascony. In the previous reign, according to *Glanville*, the *disseisin* must have been since the last voyage of King Henry II. into Normandy. So that the time necessary to bar a claim varied materially at different epochs. Thus matters remained until 34th Edward I., when, as all lawyers are aware, the time within which a writ of right might be brought was limited to cases in which the *seisin* of the ancestor was since the time of Richard I., which was construed to mean the beginning of that reign, a period of not less than eighty-six years. The Legislature having thus adopted the reign of Richard I. as the date from which the limitation in a real action was to run, the courts of law adopted it as the period to which in all matters of prescription or custom legal memory, which till then had been confined to the time to which living memory could go back, should thenceforth be required to extend. Thus the law remained for two centuries and a half, by which time the limitation of actions to recover real property having long since become inoperative to bar claims which had their origin later than the time of Richard I., and having, therefore, ceased practically to afford any protection against antiquated claims, the Legislature, in the 32d year of Henry VIII., again interposed, and on this occasion, instead of dating the period of limitation from some particular event or date, took the wiser course of prescribing a fixed number of years as the limit within which a suit should be entertained. But the Courts still adhered, in all that related to prescription or custom, to the previously established standard. It was, of course, impossible, as time went on, that the adoption of a fixed epoch from which legal memory was to run should not be attended by grievous inconvenience and hardship. Possession, however long—enjoyment, however uninterrupted, afforded no protection against stale and obsolete claims, or the assertion of long-abandoned rights; and, as Parliament failed to amend the law, the Judges set their ingenuity to work, by fictions and presumptions, to atone for the supineness of the Legislature, and to amend, as far as in them lay, the law which, I cannot but think, they were bound to administer as they found it. They first laid down the somewhat startling rule, that from the usage of a lifetime the presumption arose that a similar usage had existed from a remote antiquity. Next, as it could not but happen that in the case of many private rights, especially in that of easements which had a more recent origin, such a presumption was impossible, judicial astuteness, to support possession and enjoyment which the law ought to have invested with the character of rights, had recourse to the questionable theory of lost grants. Juries were first told that from user during living memory, or even during twenty years, they might presume a lost grant or deed; next, they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told not only that they might, but that they were bound to presume the existence of such a lost grant, though neither judge nor jury nor any one else had the shadow of a belief that any such instrument had ever really existed. In this way the Courts have endeavoured to supply the deficiency of the law in the matter of rights acquired by possession and enjoyment. When the doctrine of presumptions had proceeded thus far towards its development, the Legislature at length interfered, and in respect of real property (3 & 4 W. IV., cap. 27) and certain specified easements (2 & 3 W. IV., cap. 47), fixed certain periods of possession or enjoyment as establishing prescriptive rights. But with regard to all other prescriptions or customs not provided for by statutory enactments the law remains as before. With reference to the doctrine of presumption, Sir William Evans has observed, that though it may be

convenient that this doctrine should be adhered to, he should "ever retain the sentiment that the introduction of such a doctrine was a perversion of legal principle, and an unwarrantable assumption of authority" (2 *Evans's Pothier* 139). In this I entirely concur; and although I may feel bound to follow in the beaten track which prior decisions have marked out, I am not prepared to do violence to my own convictions, or to direct a jury to do likewise, by presuming in any case not governed by positive authority the existence of a state of things which I am satisfied never existed at all. But so far from its having been held that on a claim of a customary payment, the fact of such payment having been made as far back as living memory goes, must necessarily lead to the presumption of an immemorial custom, it is well established that in the case of a *modus*, its rankness, as it is called—*i.e.*, the fact that the amount paid is such that, looking to the comparative value of money, it is impossible that it could have been paid by arrangement between the parson and the parishioners in the reign of Richard I. —is fatal to the *modus*, as it rebuts the presumption which might otherwise arise. The analogy between a *modus* and such a payment as the present appears to me to be complete. The doctrine of rankness being fatal to a *modus* does not arise from any peculiarity in the nature of a *modus*. It rests entirely on the fact that the amount paid is inconsistent with the possibility of such a payment having been established in the reign of Richard I.; and I am utterly at a loss to conceive why, in the present case, the same principle should not be equally applicable. In *Shepherd* v. *Payne*, 12 C. B. N. S. 433, 16 C. B. N. S. 132, although the question of rankness incidentally arose, the Court disposed of it by holding that, as it appeared that the amount of the fees had varied from time to time, it might be inferred that the custom was not for a fixed payment, but for the payment of a reasonable fee; and the Court of Error did not proceed on that ground, but on the ground that the modern payments had been uniform, and the question of 'rankness' did not enter into their consideration; so that I am fully at liberty to apply to the present case the principle that the 'rankness' of a customary payment is fatal to its validity. I am fully sensible of the inconvenience which may result from the application of this principle to other instances of customary payments, such as tolls, fees, &c.; but these inconveniences flow necessarily from the vice and badness of the law, which requires that nothing short of an existence for seven centuries shall give validity to a custom, however reasonable in itself. While that law subsists I am bound to act upon it, and, though bound by past decisions to hold that usage extending as far back as living memory goes, or during a certain number of years, requires the presumption of immemoriality, I cannot be a party to subvert the law by presuming that which I am perfectly satisfied is, in point of fact, impossible. The utmost length to which the cases have gone is that, to uphold continued possession or enjoyment a previous possession or enjoyment for an indefinite period, or lost grants, or the like, may be presumed. However improbable it may be that the presumption is well founded, it has nowhere been held that such a presumption is to be made when the thing to be presumed is impossible."—*Bryant* v. *Foote*, 36 L.J.Q.B. 65; 16 L.T., N. S. 55.

STAMP — *Charter-Party — Agreement.* — Brokers signed a properly-stamped charter-party as agents for their principals, and then, at the request of the owner of the ship, signed this guarantee: "In consideration of our having signed the charter-party of ——— as agents of ———, we hereby guarantee the due fulfilment of same."—*Held*, that this document was sufficiently stamped with a sixpenny stamp, as an agreement, and need not be stamped as a charter-party or agreement for or relating to the freight or conveyance of money, goods and effects on board a ship, under 5 & 6 Vict. c. 79.—*Rein* v. *Lane*, 36 L.J.Q.B. 81; 2 L. R., Q.B. 144.

VENDOR AND PURCHASER—*Auction.*—At a sale under an order of Court in a mortgagee's suit, the parties had leave to bid. The conditions of sale were silent as to there being any reserved price, or the vendors having any right to bid. The auctioneer at the sale stated that there was no reserve, but the highest bidder would be the purchaser; adding, however, that the parties to the suit had leave

to bid:—*Held*, that a purchaser who had bid £19,000 in competition with the plaintiff, the highest bid by any other person being £14,000, had no right on that ground to be relieved from his purchase. If the auctioneer had made the former statement alone, the sale would have been bad.—*Dimmock* v. *Hallett*, 36 L.J., Ch. 146; 2 L.R. Ch. Ap. 21.

COMPANIES' ACT 1862—*Transfer of Shares.*—A *bona fide* sale of shares in a company made after presentation of a petition to wind up, but before advertisement of it, the parties being ignorant of the position of the company, may be supported by the Court in the exercise of its discretion given by the 153d section of the Companies' Act, 1862. But the Court will not compel a purchaser to complete the sale and register the shares in his name if the transaction be incomplete. (Lords Justices). *In re London, Hamburgh and Continental Exchange Bank (Lim.), Emmerson's Case*, 36 L.J., Ch. 177.

PRINCIPAL AND AGENT—*Horsedealer.*—Defendant was a horsedealer. S., who assisted him in his business and was also a horsedealer, sold for defendant and with his authority a horse to plaintiff. S. warranted the horse to be sound, but the plaintiff before completing the purchase, took also the certificate of a veterinary surgeon:—*Held*, that S. had, at common law, as agent or servant of a horsedealer, authority to bind defendant by the warranty, and that in the absence of knowledge by plaintiff that S. had not such authority, no evidence was admissible to show that he was forbidden by defendant to warrant, or that there was a usage among horsedealers not to warrant when a veterinary surgeon's certificate was taken.—*Howard* v. *Sheward*, 36 L.J., C.P. 42.

BILLS AND NOTES—*Club for Lending Money.*—A club was formed to raise money by subscription, and lend it from time to time to those members who offered the highest premium; such club to exist till all shares, &c., were paid. The payments were monthly, and were, first, on account of shares and spending money; and, secondly (if the member had a loan), on account of premium and interest. When a member obtained a loan, he and two sureties gave a promissory note as security:—*Held*, in an action against a surety on a promissory note, that the payments were to be considered as a partnership matter, distinct from the note, and not as payments on account of the note.—*Wright* v. *Hickling*, 36 L.J.C.P. 40.

MASTER AND WORKMAN.--*Combination Threats.*--6 Geo. IV., c. 129. The workmen employed by the respondent, a master builder, were ordered by one of the appellants, a member of a Bricklayer's Union, to leave their work, and did so. The respondent asked appellant why his men had been stopped, and was told that he must know it was on account of his apprentices. He wrote to the secretary of the society, asking, "What is the reason that my men have been taken away from me? I have heard that it was because I employed too many apprentices; of this I had no notice. I should like you to let me know what you require me to do." In answer, the secretary wrote that a resolution had been carried, that no society men would work for the respondent until he parted with some of his apprentices, and, further, that some money must be paid before "any society bricklayers will work for" the respondent. The letter was written at a meeting at which the appellants were present. Subsequently, a demand was made for L.18.—*Held*, that there was nothing amounting to a threat within the meaning of 6 Geo. IV., c. 129, § 3, so that the appellants could be convicted under that section of unlawfully, by using threats, forcing or endeavouring to force the respondent to limit the number of his apprentices. If there was any "threat" in the case it was in the resolution, but that was communicated to respondent only in answer to his own inquiry. It did not appear that it was intended that the resolution should be communicated to respondent, or that it should be anything more than the laying down of a rule of conduct for the members of the association. If it had been intended to communicate the resolution to the respondent, and that had been done, it would, according to *Walsby* v. *Auley*, 30 L. J., M. C. 121, have amounted to a threat. *Wood* v. *Bowron*, Q. B., 36 L. J., M. C. 5.

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RECENT DECISIONS IN THE LAW OF PARTNERSHIP AND JOINT-STOCK COMPANIES.

SINCE the publication of Mr Clark's work on Partnership and Joint-Stock Companies, numerous decisions have been given, both in the English and Scotch courts, which have tended greatly to elucidate this important branch of mercantile law. It cannot be said that these decisions have introduced any new principles of importance, or that they have virtually abandoned any which had been previously adopted and acted upon. Decisions unexpected indeed by many have in some instances been given, but on mature consideration it will generally be found that such decisions were the legitimate results of principles already fully recognized; and that when properly understood they are not more consonant with theory than with equity and sound commercial policy.

It is proposed in the present article to pass in review the most important English and Scotch decided cases which have occurred within the last year, grouping them under appropriate headings.

Test of the partnership relation.—If the question had been asked what constitutes the essence of this contract, no very intelligible answer could, until a comparatively recent date, have been returned. Sharing of profits, responsibility for losses, right to take part in the management of a common undertaking, and other such consequences of the contract, might have been instanced; but until the dictum of Lord Cranworth in *Cox* v. *Hickman*, that mutual agency in a given business or undertaking is the origin of these rights and obligations, and consequently the true test of the partnership relation, the doctrine of the civilians, *contractus societatis non secus ac contractus mandati*, may be said to have been in a great measure forgotten or disregarded.

The simplicity and soundness of this principle commends itself to any one who reflects on its application; and there can be little reason to doubt that, if it had been present to the mind of the English judges who inaugurated the doctrine that sharing of profits was the true test of partnership liability, such cases as *Waugh* v. *Carver* would have been placed on a more intelligible footing, and the metaphysical subtleties which were resorted to in order to avoid the positive injustice found to flow from that doctrine would have been rendered unnecessary. The new doctrine of mutual agency appears now to have firmly established itself in English law; and the case of *Bullen and another* v. *Sharp*, Nov. 29, 1865, 35 L. J. C. P., in the Exchequer Chamber, 105, will be read with great advantage, as explaining the principles upon which the doctrine rests, as well as the manner of its practical application. The opinions of Mr J. Pigott, B., Blackburn, J. Channell, B., and Bramwell, B., are most instructive, and deserve the most attentive perusal. It seems to have been thought by some that the doctrine in question is scarcely applicable in Scotland, because in our system the firm being a separate person, the partners must be conceived as holding agency or *mandate* for it, and not as in England for each other. But, as in many other cases, this seeming distinction, when properly examined into, turns out to be a mere difference in expression. If, according to Scotch law, the partners are not agents directly for each other, they are agents for the firm for whose obligations each is liable. Now it is the presence of this element of agency which forms the test of the partnership relation.

Extent of the implied Agency of Partners.—Some cases of importance illustrative of this important subject have recently occurred in England. In *Atkinson* v. *Mackreth*, June 27, 1866, 35 L. J. Ch., 624, one of a firm of solicitors received a sum of money from a client to be applied in compounding with his creditors, and gave him a receipt in name of the firm. The partner who received the money afterwards absconded with it. To a bill filed by the client against the other partner for the amount, it was pleaded that the latter was not liable, in respect that the money had not been received for purposes within the scope of the partnership business. This plea was not sustained, as it was held that the firm had due notice of the purpose for which the money had been received, and had applied part of it in payment of their account. But while this case shows that agency will be implied

for all purposes fairly falling within the line of business, the subsequent case of *Forster* v. *Mackreth*, Feb. 12, 1867, 2 Law Rep. Ex. 163, may be referred to as showing that agency will never be implied for transactions in their nature foreign to the company business. In that case it was decided that a member of a firm of attorneys has no implied authority to bind his copartners by a post-dated cheque, drawn in name of the firm. The law was stated thus. Channell, B., "An attorney has not ordinarily power to bind his partner by his acceptance, but he may by usage have that power. Where such a power exists, it is assumed to exist for all purposes, and its exercise binds unless it is shown that the authority was limited, and was known to be so, or the transaction was accompanied by fraud." Martin, B., said, "In this action the defendant was sued upon a bill and a cheque, the one indorsed, the other drawn by his partner in the name of the firm. It is clear that no action can be maintained upon the bill, because there is no authority in one member of a firm of attorneys to bind the rest by drawing or indorsing bills in the name of the firm. With respect, however, to the cheque, the case is different. There was abundant evidence that both parties had authority to draw cheques in name of the firm as occasion required. But in the present case the facts were peculiar . . . We have considered the case a great deal, and much doubt has existed in the mind of the Court; but we are all of opinion that we cannot in substance distinguish this cheque from a bill of exchange at seven days' date." The opinions of the judges in this case afford valuable comments on the well-established principle that the implied agency of a partner is defined by what is necessary to carry on the company business in the usual way. Bill transactions are quite foreign to the business of attorneys when conducted in a proper and legitimate manner; whereas drawing of cheques is necessary to the ordinary conduct of their business. Hence, while the former requires express authority, the latter, unless in special cases, falls under the implied agency. See also *Elston* v. *Deacon*, Nov. 8, 1866, 2 Law Rep. C. P. 20.

It is important to notice how the same principle, which is thus found regulating the implied powers of partners, may be traced in operation in the fully incorporated joint-stock-company in relation to the powers of directors. In the case of *Bateman* v. *The Mid-Wales Railway Co.*, May 1866, 35 L. J. C. P. 205, it was decided that a railway company, incorporated by special Act, containing the usual clauses inserted in such statutes, cannot accept bills of ex-

change. Here the bills were directed to the Mid-Wales Railway Company, and were accepted in the following form:—"Accepted by order of the board of directors, and payable at the Agra and Masterman's bank, John Wade, Secretary," with the seal of the company affixed under these words. And there was no question but that there was a resolution of the Board of Directors to the above effect. Now here, as in the case of a private partnership the test of implied power was stated to be *necessity*. "Is it necessary for the purposes of the corporation?" If the corporation be a trading company, then the power of entering into bill transactions will be presumed, because the company business could not otherwise be carried on. But a Railway Company, though it may be accidentally engaged in trade, is not formed by the legislature for that purpose. The statutory purpose is, formation of a railway. In this respect it is quite different from such corporations as the Bank of England, the very objects and purposes of which are to engage in trade. But while the power of accepting bills is not implied, it is quite possible that the Legislature might have conferred authority to this effect in the special act, or in some of the consolidated statutes incorporated therewith. Such, however, has not been the case. This decision has, it is believed, been received with a good deal of surprise among the mercantile community, both in Scotland and England. Yet, when fairly considered, it seems to be a plain deduction from the well-known principles of corporation law. A corporation is the mere creature of public authority, and can therefore be possessed of no powers beyond such as are directly conferred, or plainly necessary for the purposes of carrying out the end of its creation. If a partner of a firm of attorneys have no implied agency to bind the concern by accepting bills of exchange, in as much as it is not a trading firm, so neither ought the Board of Directors of a Railway Company to have implied authority to the like effect, seeing that it is not a trading association in the proper sense of that term. Moreover, it should seem that this decision, apart altogether from technical rules of law, rests upon sound principles of policy. If the direction of a Railway Company had power to bind the undertaking by negotiable instruments of this kind, it is very easy to see that a wide door would be opened for abuses of all kinds. It is important to observe that the English Court has been careful to rest its judgment on grounds which do not involve any technical specialties peculiar to that system, but has placed it on such general principles of corporation law as are, or ought

to be, recognised in this country as well. Hence there does not appear to be any room for the idea that if a similar question was to arise in Scotland the decision under consideration would not be given effect to. Such is the case with Railway companies formed by special Act. It must be observed, however, that they are sometimes formed by registration under the Act of 1862. When this is the case the company is in the same position with ordinary registered companies, and the direction has power to bind the concern by making it a party to bills of exchange. This arises from the provision of sec. 47, of the Act of 1862, which specially confers power to that effect on the directors. See The Peruvian Railway Co., (Limited) *v.* The Thames and Mersey Marine Insurance Co. (Limited), April 20, 1867, Law Times, 487.

The agency implied by what is necessary for carrying on the business of a firm or company in the ordinary way, cannot be restricted within narrower limits by the private arrangements of the partners. The public, unless for special notice to the contrary, are entitled to assume that agency to the full extent required for the business resides in every one of the partners. This doctrine has been long established, but the late case of *Edmunds* v. *Bushell and Jones*, Nov. 4, 1865, 35 L. J. Q. B. 20, may be referred to as illustrative of its application, and as another instance of the partnership relation being identical with that of principal and agent.

Agency of Directors.—These officials are to be regarded as the special agents of the company. This doctrine, now fully established, draws after it consequences of considerable importance, which have been recently well illustrated by some English decisions. In the case of *Totterdell* v. *The Fareham Blue Brick and Tile Co. (Limited)*, June 9, 1866, 35 L. J. C. P. 278, it was applied to the case of a joint-stock-company, incorporated under the registration Act of 1862. Seven persons signed a memorandum of association of a company for making bricks: the memorandum was duly registered. But there never were any articles of association. Two of such persons, one professing to be a managing director, and the other to be chairman of the company, engaged the plaintiff as foreman at the company brick works. He sued the company for his wages; and it was held that in the absence of proof to the contrary, the company must be taken to have given authority to such two persons to engage the plaintiff. Now, in this case it might be said that the two persons had never been held out by the company as their officials; but this character was impressed

on them by statute, for by 1st Schedule, Table A, clause 53, attached to the Act of 1862, it is provided that, "Until directors are appointed, the subscribers of the memorandum of association shall be deemed to be directors."

One of the most important consequences flowing from the doctrine in question is that, as in the case of principal and agent, if the directors enter into a contract as for the company, and performance cannot he had against the company, the directors are personally answerable to the party with whom they have contracted. The law upon this point is very clearly laid down by Lord Cairns, L.J., in *Ferguson* v. *Wilson*, Nov. 7, 1866, Law Rep. Ch. A. 77. "What is the position of directors of a public company? They are agents for the company. The company cannot itself act in its own person, it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principal and agent. Wherever an agent is liable, those directors would be liable; where the liability would attach to the principal, and the principal only, the liability is the liability of the company." See also *Kelner* v. *Baxter*, Nov. 1866, 36 L. J. C. P. 94.

It is upon this principle that the liability of companies for misrepresentations, made by their directors or other officials in relation to the company rests; and accordingly such liability will not arise where they are not acting within the sphere of their agency express or implied to bind the company. In cases, however, where the company is not bound, the directors may bind themselves. These rules have been well illustrated in the *Western Bank* cases, and the following English cases may also be referred to:—*Rashdale* v. *Ford*, July 1866, 35 Law Jour. Ch. 769; and *Hallows* v. *Fernie*, Jan. 1867, 3 Law Rep. (Eq.) 520.

It is important to observe that in companies formed under the Company Clauses Act of 1845, directors only bind the company when they act together and as a board. When acting separately, they may bind themselves and become liable in indemnity to those with whom they transact in this irregular manner; but the company will not be bound. Thus in the recent English case of *D'Arcy* v. *Tamar and Collington Ra. Co.*, June 8, 1867, 2 Law Rep. (Ex.) 158, the prescribed quorum of directors being three, the secretary affixed the seal of the company to a bond, after having obtained the written authority of two directors at a private interview, and at another private interview the verbal promise of a third to sign the authority, it was held that the seal

was affixed without legal authority, and that the company were therefore not liable on the bond.

Remuneration to officials. The numerous cases decided in England, to the effect that directors or other officials are entitled to no claim for their services beyond what has been fixed by express agreement, should, it might have been thought, have set all such questions at rest for the future. Such, however, has not been the case, as appears from *Clouston, &c.*, v. *The Edinburgh and Glasgow Ra. Co.*, 1865, 4 Macph., 207. The decision was exactly the same as that which would have been given in an English court in the like circumstances, and there can be no doubt that the law upon this subject is the same in both countries.

Promoters. Some decisions of interest in relation to this subject will be found recently reported in England. It was at one time supposed on the authority of Lord Cottenham that promoters were so far the agents or *quasi* agents of their companies when in course of formation, that the company when formed should be held bound by contracts previously entered into by its promoters on its behalf. Latterly, however, the unreasonableness of holding persons to be bound by such previous engagements when they had taken shares in the company, understanding it to be such, and such only as its special act defined it to be, led to the adoption of the opposite view, and the judgments of the House of Lords in the *Caledonian Railway Co.*, v. *Magistrates of Helensburgh*, and in some English cases have been quoted as shewing that a company formed by Act of Parliament will in no case be liable for engagements entered into by its promoters before the special act has been obtained. That this view if rigorously carried out would result in equal injustice with the former, soon became evident; and accordingly its application was always limited by various equitable considerations. Thus, if the special act contained anything which could be taken as recognising the previous engagement of the promoters, or if the company when formed had in any way adopted the transaction, it was held to be binding. In the late case, however, of *the Earl of Shrewsbury* v. *the North Stafford Railway Co.*, Dec. 1865, 35 Law Jour. (Ch.) 156, a principle, which though previously noticed had not been prominently brought forward, appears to have been made the *ratio decidendi*. According to this principle, a company after obtaining its special act will be held bound by the previous engagements of its promoters, when such engagements were plainly requisites for obtaining its special act, and were of such a nature that they

would have been *intra vires* of the company if it had been formed at the date when they were entered into. It must be confessed, however, that the doctrine so inaugurated is still very far from being sharply defined, and that in its application, very much will depend on the discretionary powers of the court. In the subsequent case of the *Madrid Bank* (*Limited*), May 1866, 35 Law Jour. Ch. 474, a similar principle was applied to the case of a company formed by registration. Here it was held that a stipulation in the articles of association that a certain sum should be paid to the promoters was valid and binding on those subsequently taking shares, provided that all the facts had been fully disclosed, and that no concealed agreement existed whereby the directors were to obtain an illegal profit. It may here be noticed that in the case of *Savin* v. *The Hoylake Railway Co.*, Nov. 1, 1865, 35 Law Jour. Ex. 52, it was decided that the usual clause contained in a railway company's special act directing the charges incident to procuring the act, to be paid by the company, does not render the company liable to pay for work done under an agreement between the promoters and a party, by which it was stipulated that he should pay all the costs, &c., and that the company should not be liable to reimburse him for any of the expenses incident to obtaining the act.

Shares. The general principles which govern questions relative to the application for and repudiation of shares, have for a considerable time past been pretty definitively ascertained. The following new cases may, however, be noted. In *The Ramsgate Hotel Company* v. *Montefiore*, Jan. 1866, 35 Law Jour. (Ex.) 90, it was held that when shares in a joint-stock-company are applied for, they must be allotted within a reasonable time, and that otherwise they may be refused, and the applicant may recover back the deposit. This is in fact nothing else than a special application of the common law doctrine, that an offer not concluded by acceptance within a reasonable time is held to have been rejected, and may be resiled from. Where, however, in cases of this kind the deposits are not at once returned, the remedy lies against the company, and the applicant has no right to injunction or interdict against third parties. Thus in *Mosely* v. *Cressey's London and Burton's Steam Cooperage Co.*, (*Limited*), Dec. 19, 1865, 35 Law Jour. Ch. 360, the prospectus provided that deposits would be returned if no allotment of shares was made. No allotment was made, but in the meantime the plaintiff had paid the deposits into the company's bank to account of the company. The plaintiff then

filed his bill against the company, certain of its creditors and the bank, alleging that the deposits had been paid upon a specific trust, viz., to be returned if no allotment was made, and had never belonged to the company; and praying that the bank might be restrained from paying over the deposits to any one other than the depositor. It was held that the deposits were assets of the company; that no specific trust or lien in favour of the plaintiff had been created, and that the remedy was by action at law against the directors. It must be noticed, however, that the decision in this case went a good deal upon the peculiarity in English law which distinguishes between the functions of a Court of equity and those of a Court of law. In Scotland where the same tribunals administer both law and equity, it is not impossible that in similar circumstances an Interdict might be granted.

In the general case where a party applies for shares in a company purporting to be formed for certain purposes, he will not be bound to take shares allotted to him, if the company when formed differs substantially from that contemplated. Some cases illustrative of this principle have recently occurred. Thus in *The Russian Iron Works Co. (Limited)*, July, 1866, 35 Law Jour., Ch. 738, it was held that an allotment of shares in a company before the existence of the memorandum and articles of association, will not prevent the allottee from having his name removed from the register, if those documents when published differ materially from the statements contained in the prospectus. In that case it was further decided that acquiescence would not be inferred from mere lapse of time or attempts to sell shares, unless *scienter* could be established; but that drawing dividends, or acting as a partner would. That *scienter* will bar subsequent repudiation is established by the case of *The Hop and Malt Exchange Co. (Limited)*, Feb. 1866, 35 Law Jour., Ch. 320. Here it was held that a person who had been induced to take shares by misrepresentation could not repudiate them after attempting to dispose of them when in the knowledge of the misrepresentation. In all cases the misrepresentation founded on must go to the essence of the contract—a mere unimportant and unsubstantial variance will not be sufficient. This is well illustrated by the case of *Overend, Gurney, & Co.*, Feb. 9, 1867, 3 Law Rep. Eq. 576. Several more cases bearing upon this subject will be noticed under the head of Contributories.

Winding-up.—As a general rule, it may be laid down that when a company is in course of being wound up voluntarily, the Court will not interfere unless a strong case can be made out for its intervention. This has been illustrated by several recent cases. Thus, in the London Mercantile Discount Company (Limited), Dec. 1865, 35 Law Jour. (Ch.) 229, the Court refused to assume supervision on the petition of a minority against the wishes of a majority, which was not shown to have been obtained by undue influence; and in the Sea and River Marine Insurance Company, June 1866, 35 Law Jour. (Ch.) 820, it declined to interfere when the concern was small, and no difficulties appeared to exist. It has been decided that the power of the Court under sec. 147 of the Act of 1862 to direct a voluntary winding-up to continue, but subject to its supervision, is entirely discretionary, and will be exercised according to the circumstances of the case. Bank of Gibraltar and Malta (Limited) Nov. 3, 1865, 35 Law Jour. (Ch.) 49.

Some difficulties have been felt in determining what companies may be wound up under the Act of 1862. These difficulties are due principally to the ambiguous and conflicting character of some of the statutory provisions. The following decisions have been given on this subject:—*In re*, The London India Rubber Company (Limited), March 1866, 35 Law Jour. (Ch.), 592, it was decided that a company formed and registered under any of the Acts mentioned in the 175th sec. of the Act of 1862, is, under the 176th sec., to be treated as if it had been registered under that Act, and is consequently capable of being wound up voluntarily. In the previous case of Bowes and the Hope Mutual Insurance Company, March 1865, 35 Law Jour. (Ch.) 574, it was decided that the words "registered companies," when used in the Act of 1862, apply to companies registered under the Act itself, and that the words "unregistered companies" apply to companies registered previously to the passing of that Act; and, therefore, that a company registered under the Act of 1844 was an "unregistered company" under the Act of 1862, and capable of being wound up under that Act.

As a general rule, when a valid debt has been constituted against a company, the Court has no discretion whether to wind up or not, but is bound to order a winding-up. Yet this rule is not of invariable application; and, accordingly, when the sole creditor of a company applied for a winding-up order, on a judg-

ment debt which was of a suspicious character, and alleged to have been obtained by fraud, the petition was ordered to stand over until the company should have an opportunity of showing, if it could, that no such debt existed. See the previous case.

When several petitions are presented for winding-up the same company, it is settled in England that where an order has been made upon one of them, each of the subsequent petitions must be treated individually, as if it were the only one presented, and, to entitle the petitioner to costs, must disclose such facts as would induce the Court to make a winding-up order, if no petition had been previously presented. *In re*, The European Bank, July 3, 1866, 35 Law Jour. (Ch.), 690.

The primary purposes of a process of winding-up is to divide as speedily and conveniently as possible the company assets among its creditors. It must not, however, be forgotten that an object of almost equal importance is that of apportioning and equalising the losses among the contributories. Hence it has been decided that payment of calls may be exacted from a contributory after the company debts have been paid (Graham *v.* Liquidators of the Western Bank, Feb. 23, 1866, 4 M'Ph., 484.) So, also, it has been held that liquidators have power to make calls on shares not fully paid up, so as to reimburse fully paid up shareholders. Anglesey Colliery Co. (Limited), May 1866, 35 Law Jour. (Ch.), 546, Aff. August 1866, 33 Law Jour. (Ch.), 809. On a similar principle, it has been decided that the 102d sec. of the Act of 1862 does not oblige the Court to put off making a call until the claims of creditors against the company have been established as debts. Contract Corporation, Nov. 1866, 2 Law Rep. (Ch.), 95.

The duty of liquidators is not to create new obligations, but to settle those already existing. Hence it has been decided that bills ought not in general to be negotiated by official liquidators, without at least obtaining the sanction of a judge at chambers. Commercial Bank Corporation of India, June 1866, 35 Law. Jour. (Ch.), 617.

In realising the company estate, though all convenient dispatch is to be used, care must be taken that the rights of third parties are not injured or compromised. Thus, where during the winding-up of an incorporated company, a quarrying lease, taken to the company for a term of years, but without any prohibition to assign, was assigned by the official liquidators and the company

to a stranger, and the lessor objected to the arrangement, he was allowed to enter a claim against the company's estate for the whole amount of the future rents till expiration of the term. Haytor Granite Gas Co., *Ex parte*, Bell, Dec. 21, 1865, 35 Law Jour. (Ch.), 154.

The policy of the statutory provisions for winding-up is similar to that of the Bankrupt Acts; at the same time, it does not appear to have been the intention of the Legislature wholly to assimilate the law as to the administration of the state of a company with that of an individual bankrupt. The general rule is, that the company estate shall be realised as a whole, and divided among creditors according to their respective claims; yet cases may occur where it would be of advantage to allow a creditor to follow out his diligence as an individual. Accordingly, while by sec. 163 it is provided that when the company is being wound up by the Court, or subject to its supervision, all diligence or execution put in force against the estate after commencement of the winding-up shall be void, it by sec. 87 gives by implication power to the Court to modify this rule when necessary or desirable. An example of the exercise of this power, by giving leave to a judgment creditor of a company, which was being wound up, to proceed with execution, will be found *in re*, The London Cotton Manufacturing Co., March 13, 1866, 35 Law Jour. (Ch.), 425.

THE ABUSES OF MERCANTILE INSURANCE.

ALL writers on mercantile insurance have sounded its praises as one of the principal characteristics which indicate the vast superiority of modern over ancient commerce. They adduce the simple fact of the absence of the contract of insurance from the jurisprudence of Rome, as sufficient to demonstrate the very paltry limits of the trade of that mistress of the world. Undoubtedly it encourages enterprise, and tends to make merchants more venturesome. At the same time it gives the merchant, who has so much at hazard, a peace of mind which the ancient trader could never know. The fully-insured merchant of London can little sympathize with the tremors agitating the mind of the Merchant of Venice. Had there been an Italian Lloyd's in the days of Antonio and Shylock, the Merchant's friends would have advised him to go to the underwriters, instead of bewailing the dangers of commerce.

"Had I such ventures forth . . . .
My wind cooling my broth
Would blow me to an ague when I thought
What harm a wind too great at sea might do.
I should not see the sandy hour-glass run,
But I should think of shallows and of flats,
And see my wealthy Andrew docked in sand
Vailing her high-top lower than her ribs
To kiss her burial. Should I go to church
And see the holy edifice of stone,
And not bethink me straight of dangerous rocks
Which, touching but my gentle vessel's side,
Would scatter all her spices on the stream,
Enrobe the roaring waters in my silks,
And in a word, but even now worth this,
And now worth nothing."

A policy of insurance at five per cent. premium deprives these lines of all force, enabling our traders to cool their broth without shivering, and to sleep in church without starting in their dreams.

The principle on which insurance is based is the division of risk and loss. While, however, the fact of the loss being divided, and the risk being proportionally diminished, tends to lessen the fear and anxiety of traders, it also tends to weaken their sense of responsibility. Decreasing the responsibility decreases the occasion for care; and when responsibility is reduced to zero, all care disappears. It is a matter of utter indifference to the fully insured trader whether he get his L.1000 from the successful issue of his venture or from the insurance company; and when this equilibrium of interest occurs, he cannot be expected to trouble himself to bring about the one result in preference to the other. But the danger increases beyond the point of equilibrium. By means of insurance it frequently occurs that the interest of the trader may be better served by the loss of his venture than by its success—that he may make more out of his insurance than his speculation. When this happens, all that is beyond the equilibrium is simply a bribe to crime, increasing the negligence of the honest merchant, and tempting the cupidity of the dishonest. The inevitable consequence of full and over-insurance is the culpable and criminal increase of fires and shipwrecks. This is the abuse to which this very beneficial system is liable.

We have much fuller and more accurate information regarding wrecks than with respect to fires; for the Board of Trade lays before Parliament an annual blue-book on the subject; whereas fires pass from public attention like any other casualty, except when strong suspicions of incendiarism are aroused. Even the "Annual Wreck Register," however, although most valuable so far as it goes, is by no means ample in its information, for it only chronicles the disasters which occur on the coasts of the United Kingdom, or in the adjacent seas. The total number of wrecks and casualties reported in 1865 was 1656, being nearly 300 above the average of the last ten years. The number of ships implicated was 2012, which is the largest number ever reported in one year. There were 1300

casualties other than collisions, and of these no fewer than 322—*i.e.*, one-fourth—"appear, from the reports made by officers on the coast, to have been caused by inattention, carelessness, or neglect." A heavy item is the number of ships which founder from simple unseaworthiness. Last year there were 354 collisions, and of these no fewer than 243—*i.e.*, upwards of two-thirds—were the result of negligence. The special headings under which they are tabulated by the Board of Trade are "bad look-out," "neglect to show proper light," "neglect or misapplication of steering or sailing rules," "want of seamanship," "general negligence and want of caution," and "error in judgment." Only 30 were attributed to "inevitable accident;" from which the inference is very manifest that 324 must have been avoidable.

As a particular illustration of these unnecessary—though not criminal—losses of life and property, take the case of the *Ceres*, wrecked at Carnsore Point, on its usual passage between Falmouth and Dublin on the 11th of November last. The day of this catastrophe was foggy. The ship passed certain lights and landmarks without seeing them, and at last struck upon a rock some twenty-three miles out of its ordinary course. The vessel immediately broke in two, four of the five boats were washed overboard and lost, and only twenty-six of her passengers and crew were saved. The Board of Trade instituted an inquiry, and the conclusion arrived at was "that the loss of the ship must be attributed to the default of Captain Roscoe in not using the lead, which the circumstances of the case imperatively demanded." The counsel for the captain, seeing the weak point of his case, endeavoured to strengthen it by saying: —"If a captain were to bring his vessel to half-a-dozen times on a voyage for the purpose of heaving the lead simply because the weather was thick, when he had no moral doubt whatever of the ship's position, he would be told by the owners, 'You are not the man for us; we must get some one who has more confidence than you have in his own judgment, as it is no use trusting one so timid with the control of our ship.'" It takes from ten to fifteen minutes to heave the lead. One cast would in this case have sufficed, and the circumstances are declared by the Board of Trade to have "imperatively demanded" it. The argument of the counsel seems to be that, in the balance of the shipowner's interest, the gain of thirty minutes on the passage outweighed the loss of thirty lives, and the ship into the bargain.

The subject touches other interests besides those of trade, for the cause of this increase of preventible wrecks is undoubtedly the general inefficiency of the mercantile marine; and anything that manifests deterioration in the sole nursery of the British navy, cannot but be regarded with keen interest by the nation. In July last, Mr Graves, M.P. for Liverpool, moved for a commission to inquire whether, within the last twenty years, the supply of British seamen had or had not fallen off either in point of number or of efficiency.

To prove that it had, he quoted very strong expressions of opinion from the superintendents of the shipping offices of London, Glasgow, Liverpool, and several other leading seaports. On behalf of the Government, Sir Stafford Northcote, then Chairman of the Board of Trade, opposed the motion, on the ground that the facts sought to be ascertained were already known and indisputable. He alluded to several of the remedies suggested by different members, and said:—

"The true remedy his right honourable friend (Mr. Henley) seemed to say was in the hands of the shipowners themselves, who might get better men by paying better wages. No doubt that was the true and simple remedy. But the shipowner was bound to look after his own interest; and if he could get men who would answer his purpose at a low rate, he would not pay a higher rate. It so happened that among foreigners and in other directions he was able to find men who, though not of the highest class, were efficient enough to serve his turn. That being so, it was idle to expect that the shipowner would give higher wages than those for which he could get the services of such men."

This remedy cannot be called the "true" one, if it cannot be applied. In showing how it cannot be applied, Sir Stafford Northcote very nearly touched upon the real cause of the evil. He states that it is the interest of shipowners to employ inferior in preference to superior seamen. The analysis above given of the Wreck Register shows what is implied under the expression "inferior seamen." One-fourth of the casualties other than collisions, and two-thirds of the collisions are to be ascribed to the inferiority or inefficiency of the seamen. But in the face of these statistics, the President of the Board of Trade assures us, that it is the interest of shipowners to employ these inefficient seamen—that is, to engage at a low rate men who, by ignorance and negligence, will cause 243 collisions rather than to hire properly qualified men at a higher rate. Such a principle holds true in no other line of business. In no other branch of industry is it the employer's interest to engage inferior workmen, for bad hands are dear at any wage. An inferior mill-hand spoils his web, and it is the interest of the millowner to prevent that. The inferior seaman wrecks his ship, but it is not the interest of the shipowner to prevent that. The reason of this difference between shipowners and other employers is, that by means of insurance they can purchase immunity from the casualties caused by the inferior sailors at a sum about equivalent to the extra wages which better sailors would require. This is a perfect anomaly in our jurisprudence, for every other employer is responsible for the ignorance and negligence of his men. Imagine the consequence, if a similar privilege were granted to carriers on land. If railway companies could purchase on like terms immunity from the consequences of all casualities caused by "bad look-out," "neglect to show proper light," "ignorance or misapplication of the rules of rail," "want of knowledge in engineering," and "general negligence and

want of caution" on the part of their engine-drivers, guards, and station-masters,—what would be the result? Undoubtedly the deterioration of these workmen, and the increase of railway accidents. Then, if our army was as much dependant on the railway for recruits as the navy is on the mercantile marine, some M.P. would sound the alarm, and the Chairman of the Board of Trade would admit the deterioration, and affirm that it was the interest of the companies to employ inferior workmen. This reasoning, which is admitted as plausible in the case of shipowners, would be scouted as absurd if attempted in that of railway companies.

But insurance is exposed to a greater abuse than merely deadening the sense of responsibility in the minds of honest shipowners, and encouraging negligence and inefficiency in the mercantile marine. It operates as an incentive to crime. There is no criminal path, in which larger "hauls" are to be made with greater ease and safety, than in a carefully-managed course of fraudulent marine insurance. The advantages of this field of criminal enterprise over fire and life insurance are immense. No coroner's inquest sits upon wrecks, and their *locus* is generally beyond the jurisdiction of any procurator-fiscal. A *post mortem* examination of a murdered victim, or a minute scrutiny into the circumstances of a fire exposes the murderer or incendiary to great risk of detection; but a vessel scuttled in mid-ocean is for ever beyond the reach of human investigation. No evidence of the crime of wrecking is obtainable in the general case, except the log-book of the ship and the testimony of the officers and crew. As the crew generally know nothing about it, as the officers have done it, and the log-book has been doctored, there is seldom much chance of a conviction. Under similar conditions murder and incendiarism would soon become flourishing branches of the criminal profession. Any scoundrel would feel quite comfortable at his trial, if the proof of his crime were limited to his own writ or oath: and that is pretty nearly what it comes to in the case of the wrecker.

The *modus operandi* of the fraudulent marine insurer is simple in the extreme. He purchases some old craft, fills it with rubbish, and effects as large insurances as if it were a good vessel and valuable cargo. A month or two after the ship sets sail for the antipodes, the master returns from some outlandish port and tells how he was wrecked on such a day, giving the exact latitude and longitude, and producing the log-book and protests as his vouchers. The owner claims insurance, and the underwriters pay it. Even though they have suspicions of foul play, they generally pay rather than risk a tedious trial, and endanger their custom with honest traders, who value nothing more highly than prompt payment for losses.

Statistics upon this branch of our subject are very meagre. As already mentioned, the Wreck Register records only those casualities which occur on the coasts of the United Kingdom or in the adjacent seas: and it is only when the underwriters refuse a claim and insti-

tute inquiry, that the fraudulent marine insurer is in any danger of detection.

In place of general statistics, allusion may be made to the recent interesting and illustrative case of the *Severn*. At the Central Criminal Court held in London during the month of February last, two men were sentenced to twenty years penal servitude, another to ten, and another to five, for scuttling this ship and attempting to defraud the insurance companies. The perpetration of the crime in this instance was distinguished by a carelessness and openness indicative of a hand grown callous by repetition and a heart grown fearless by previous escapes. No one, attempting such a crime for the first time, would have been so regardless of appearances. We are not surprised, therefore, to hear Webb the principal actor confess to the captain, that he had done the trick successfully before, and would do it again; and to learn that another warrant was out against him and one of his accomplices for wrecking the *Jane Brown* some years ago. A rather ugly circumstance was elicited in the cross-examination of the captain, viz., that the *Severn* was not the first insured vessel which had gone down mysteriously while under his charge. The evidence in this case leaves one in little doubt, that the accused were a regular gang of fraudulent marine insurers. Probably they were not a solitary one.

Most of the remarks, which have been made with reference to wrecking, apply equally to fires. The tendency of full or over-insurance to produce carelessness is exactly similar, the temptation to crime is equally strong—save for the check afforded by the greater risk of detection. The motives leading to the crime of incendiarism, as disclosed at trials, are invariably hatred to the person whose property is set on fire, or the desire to defraud the insurance companies—except in such rare cases as that which occurred at the Glasgow Circuit in September last, where a man was tried for committing eleven acts of fire-raising, the sole discoverable motive being the pleasure and excitement of helping to extinguish them.

A fire is often an immense boon even to the honest merchant. He may have too large a stock on hand, it may be getting out of fashion or past the season, or he may be hard pressed for ready money. In such circumstances a fire is a most welcome customer. It takes no exception to old fashions. It never attempts to drive a hard bargain, but pays in cash with no abatement. Should it not clear the whole stock, its visit to the premises greatly aids the sale of what remains. It attracts public attention, and gives an emphasis and prominence to the advertisements which immediately crowd the newspapers, about the cheap sale, at immense sacrifices, of the slightly soiled goods. Even an honest dealer often reaps the benefit of the happy accident, which a little more attention on his part might have prevented. It is not a wide step from this, for the criminal, with that art which apes simplicity, to bring about a similar happy accident. A skillfully adjusted train of carelessly thrown down waste-paper left at

closing the shop at night between the fire-place and certain very inflammable goods, does the whole trick, and the fire by its success destroys all trace of its origin.

In the absence of statistics we have recourse to the opinions of those who may be held authorities on the subject of fires. In a work on Fires published last year by Mr Charles Young, Civil Engineer, London, there occurs the following expression of opinion: "Fires are continually said to occur by accident, or are, as they are termed, accidental: it has been said that 99 fires out of every 100 are preventible, and may be divided into two kinds—those which are wilful and those which arise from carelessness." No higher authority on any matter connected with fires can be found than the late Captain Braidwood, who so long and successfully commanded the London Fire Brigade, and he states in his posthumous work on this subject that nineteen-twentieths of the fires which take place are attributable to negligence alone. He mentions a case where upwards of £100,000 were lost through the partner of a large establishment lighting gas with a piece of paper which he carelessly threw away, although it was a strict rule in the place that gas was to be lighted with tapers which were supplied for the purpose. With regard to incendiarism he says (p. 46) that while malicious and monomaniac incendiarism is very rare in London, fraudulent incendiarism is rather common.

Much more of personal interest might have been imparted to this article by narrating the criminal career of the Frenchman, Douat, on whom sentence of death was passed at Antwerp in November. This man graduated in crime at Bordeaux, in 1864, by committing one or two good felonies of the ordinary type—fraudulent bankruptcy and forging bills of lading to the value of £36,000. He then began to manifest a genius able to grasp the immense criminal capabilities of insurance, in all its branches of life, fire, and marine. A man cannot set up as a criminal in either of the two latter without some capital for the purchase of the property to be insured. But life insurance requires only the amount of the first premium; and if he has no wife—unlike Palmer and Pritchard—whose life he could insure and then terminate, he has always an insurable interest in his own. Douat accordingly effected, in certain Parisian offices, on his own life, insurances to the extent of £4000. He then retired to London in order to die there. This he speedily accomplished, and promptly despatched to his accomplices a certificate of the mournful event. While they were following up his scheme against the Parisian insurance companies, he was following his coffin to a London suburban cemetery, where, with the usual indications of sorrow, (he wept at the trial when he thought of it) and the customary ceremonies of religion, he committed to the grave a lump of lead. His was the frequent fate of genius—not to be appreciated by his age. Many portions of his biography are wrapt in obscurity; but in July last he turned up in Antwerp. He chartered a vessel to take a cargo of watches, jewellery, &c., valued at 250,000 fr., to India, and attempted

to effect large insurances on them in the Dutch companies. These, however, being too stolid and cautious, demanded a sight of the goods. There they were in immense hampers, lying on the harbour in the immediate vicinity of the shipping; but a minuter inspection could not be allowed, because the cases were lined with zinc, and the goods so skilfully and carefully packed, that no man there could replace them. The companies were too stupid to be convinced, and got an order from the judge to have the hampers opened. A day was appointed for the purpose, and Douat received notice to attend. On the night before that day the hampers burst into a fierce conflagration, the flames communicated with the nearest vessels, and the whole shipping in the harbour was in imminent danger of total destruction, but for the prompt efforts of the harbour officials and a favourable wind. The hampers were not totally consumed, and among the *debris* was found a good sample of their contents;—instead of watches and jewellery, shavings and chips, tar, powder, and alcohol. The individual, who had been observed skulking out of the harbour almost immediately before the fire broke out, was identified as Douat, and sentence of death has been the consequence.

We have left but little space to discuss the remedies which have been suggested for these evils. With reference to incendiarism, that which at once occurs is more thorough investigation into the origin of fires. The two English writers, to whom reference has been made, being familiar with the operation of coroners' inquests, suggest that an inquest on each fire would be the true mode of lessening this evil. In Scotland the procurator-fiscal is our substitute for the English coroner and his jury; and the Lord Advocate has in a recent circular directed the special attention of these officials to this subject. Whenever a fire occurs, and there are circumstances of suspicion about its origin, an investigation is to be instituted and followed out; and in cases of extensive destruction of property, or where life has been endangered, the fiscal is to satisfy himself as to the absence of any ground of suspicion.

No doubt such provisions may prove remedial to a certain extent; for the danger of detection is always a prime deterrent from crime. But such a remedy is limited in its application, and falls short of complete efficacy. It can affect incendiarism alone, and leaves unmet the greater evil of fraudulent marine insurance. Besides, the fear of detection, so long as it does not amount to certainty, can only repress crime; it cannot exterminate it. This greater and perfect result can be accomplished only by the removal of the incentive to crime. An unmistakeable illustration of this principle is the utter annihilation of the crime of smuggling across the border, produced by the equalisation on both sides of it of the excise duties. When the Scotch duty on whisky was 2s. 4¾d. a gallon, and the English duty was 11s. 8½d., there existed a bribe and incentive to crime which no danger of detection was sufficient to repress. Whenever a uniform duty of 8s. was imposed, smuggling ceased. The only hope for such

a remedy in the case in question is in a legislative enactment, prohibiting full insurance, and necessitating in every case of loss by fire or sea that the owner should himself bear a certain proportion of that loss. This principle, if it could be elaborated into a workable scheme by practical insurers and legislators, would place our whole system of insurance on a much sounder basis than it has ever yet occupied. It is in perfect harmony with the essential theory of insurance, which is the division of risk among many, and not the entire removal of all risk from him who alone has any power to avert danger. There would then be no equilibrium of interest between the loss and the success of mercantile ventures, and no balance over to weigh down the scale of culpable negligence or crime. It would purge our jurisprudence of that rank anomaly—the total practical exemption of shipowners from the injurious consequences of the negligence or ignorance of their *employès*. It would make their interest to have only the 30 "inevitable" collisions, rather than the 324 avoidable ones; and for this purpose it would necessitate the employment of more and better seamen. Thus would the deficiency in our naval nursery be remedied, and Mr Graves be satisfied. At the same time, the premiums of insurance would be immensely lessened. At present the underwriter charges the honest and careful as well as the dishonest and negligent trader, according to a scale calculated to protect him against all losses, however occasioned. He estimates at present that there shall be 354 collisions; then, he would reckon on only 30. The saving thus effected on insurance would fully cover the increased expenditure in seamen's wages. The same holds true with regard to fires. According to one of the authorities quoted above, nineteen-twentieths of the fires are preventible, being the result of negligence; and by another authority, ninety-nine per cent. are caused by negligence and fraud. That insurance premiums would fall with the lessening risk is demonstrated by the experience of Liverpool. During the five years from 1838 to 1845, there was lost in that town £776,762 on warehouse risks. Insurance premiums rose from 8s. per cent. to 30s., 40s., and even 45s. per cent. As trade was unable to bear such a heavy additional impost, a local Act of Parliament, 6 and 7 Vict., c. 109, was obtained, restricting the size and height of warehouses, and enacting other expensive precautionary measures. A retrospective effect was given to the Act, and tenants in old warehouses were authorised to make the prescribed alterations and retain their rents till the cost was defrayed. The beneficial effect of this energetic piece of legislative interference was speedily indicated by the return of insurance premiums to their old figure of 8s.

The British public has a natural, and, on the whole, a salutary repugnance to legislative interference with civil contracts. They hold, that every man is the best guardian of his own interests. General expediency, however, necessitates, in certain instances, a departure from this principle; and we think that a good *prima facie*

case for such departure is made out with reference to mercantile insurance. Were government to interfere, it would not be the first occasion on which it has regulated this contract of insurance. Towards the close of last century the pernicious practice of gambling life-insurances so endangered the safety of the community as to necessitate the passing of 14 Geo. III., c. 48. The grounds for legislative interference now are quite different from what they were then, but they are equally valid—the preservation of property and the repression of crime. T. F.

Correspondence.

PROCEDURE IN THE COURT OF SESSION.

TO THE EDITOR OF "THE JOURNAL OF JURISPRUDENCE."

SIR,—The recent changes in the Court of Session offer a favourable opportunity for considering the whole mode of dispensing justice in our Supreme Courts. I approach the subject with no political or party bias, and with no wish to detract from the learning and dignity of the bench; our judges are all upright and admirable men; but the legal machinery which they have to work is cumbrous and out of keeping with the mercantile and mercurial spirit of the present day. It has always seemed to me a matter of surprise how the Court of Session should not be one of the most popular, as it is one of the most time-honoured, institutions of the country. It is useless to shut our eyes to the fact that it is not so. The better class of town agents shun it; even those who have made their reputation by it avoid it, while the whole class of well-to-do practitioners and conveyancers in the country, persuade their clients to settle their disputes in any way, rather than go through the ordeal of the Court of Session; and in consequence its business is a mere fractional part of the litigation of the country, or rather of what that litigation would be, if the Court of Session enjoyed the esteem of the profession and the public, to the same extent as the Supreme Courts in England do. Much has been worthily done by the late Lord President M'Neill, to facilitate business, and to wipe off arrears; his example gave an impulse and energy to the whole bench; but, notwithstanding his unflinching integrity and devotion to work, there are six months' arrears of cases waiting to be heard in the First Division. Now when one considers that the Court of Session sits only for seven months in the year, that amount of arrears is a serious impediment to business, and a source of much heart-burning. Lord Brougham boasted that when he got the Chancellorship of England, there were eight years of arrears of cases, and that when he left the woolsack he had cleared them all off. Few men have Brougham's capacity for work; but his example and his energy, it is to be hoped, will be imitated by Lord President Inglis,—who has yet a

reputation to make as a judge at the head of the Court. Hitherto, in the Second Division, his lordship has occupied a subordinate place, and this may have somewhat hampered and crippled his energies; but the profession now looks to him to inaugurate a new reign and order of business; and, with all deference to his great experience and wisdom, we respectfully make the following suggestions. First of all, the vacations of the Court ought to be shortened, at least until the arrears of business are wiped off; the blank days of the Lords Ordinary should be abolished, and the Court ought to sit on Mondays as on other days of the week. The latter suggestion, if carried out, would, doubtless, interfere with the Criminal Court, which is held on Mondays, but Saturday might be set apart for this purpose, and except as regards criminal business, which is now for the most part of a petty description, occupying only a few hours,—we would make Saturday in reality, what practically it has long been,—a holiday. From Friday to Monday would afford sufficient rest and time to the learned judges to read their papers before entering upon the labours of a new week. These changes would make the Outer-house judges work five out of seven days of the week, instead of only three days and a half as at present. When one considers that the country pays thirteen judges £8000 a year and upwards for life, that they sit only for seven months in the year, and only for four days and a-half each week during these seven months, one is not surprised at the longevity of the judges, the diminution of business, or the amount of arrears. It is ludicrous to call their work hard work, as compared with what English judges, or members of Parliament, or medical and literary men, or even prosperous merchants, have to undergo. What would Sir James Simpson or Professor Christison give for one whole day's rest in the week to study their cases? The country, it is true, never wants a court,—for there is always a Lord Ordinary on the bills,—but the civil business of the country is in reality *in statu quo* for five months in the year. I take leave to say, there is no public establishment in this or any other country, that enjoys the same immunity from work as the Court of Session. One would not greatly grudge this, if the business of the country did not suffer thereby. All that is required is, that the judges should remain at their posts, like others, so long as there is work to do.

The next change which I would suggest is the abolition, as at present constituted, of the Commission or High Court of Teinds. Like the wooden horse of Troy, the Teind Court is too big and unwieldy for any useful purpose, but to stop the way and impede the general business of the courts. Clergymen and antiquarians may have some remnant of veneration for the large antique animal, but few lawyers understand its movements or symbols; its nomenclature is barbarous; its history obscure; and though it sometimes makes the "unskilful laugh" to see young counsel thrust and hurl their pointless spears into its hollow sides,—it cannot but make the "judicious grieve," when they consider the vast cost of time and money at which it is kept up. For though the Teind Clerk regularly scatters the incense of flowers over its deliberations, and it is in itself, a solemn and stately sight, it is also a melancholy sacrifice of time, for nine supreme and learned judges to assemble like so many conscript fathers, in solemn conclave, to determine whether a poor underpaid country minister is to have an extra chalder of meal added to his income. One judge in the Outer-House, and four in the Inner, can determine and decide a case involving the succession

to the Estates and Earldom of Breadalbane; but it needs the united wisdom of nine judges to add a chalder to a minister's stipend! If the business of the Teind Court were transferred to one of the Lords Ordinary, with an appeal in cases of difficulty, the church and clergy would not suffer, and the business of the Court of Session would not be interrupted for three hours, once a fortnight, as at present. It would be for the interest of the church and clergy, to have their cases carried through in a more speedy and satisfactory manner; for no case lingers like an opposed teind case. From the dark, mysterious, middle-aged, musty nature of the subject, it becomes hateful both to bench and bar, and to every one but the case-hardened teind clerk. On behalf of the clergy and the public alike I plead therefore for a thorough reformation and reconstruction of the Teind Court and process.

Another hindrance to the despatch of business, is the undue length of advisings in the Inner House. It is difficult to restrain within bounds the natural loquacity of human nature; and "fame," we are told, is the last "infirmity of noble minds;" but life is short and art long, and our judges would do well to remember this when advising cases *ad longum*. Each judge gives a full and separate narrative of the case, and lays before the profession and the public the whole mutilated carcass of the suit, which he has dissected and reconstructed in his study; the *disjecta membra litis* out of which he has framed his judgment,—the arguments for and against,—the objections and counter objections; nay the very lights and shadows of truth and error that swayed to and fro in his mind, are set forth in detail, with a pomp and prodigality of language and illustration, absolutely appalling to read, or look at. Much study is "a weariness to the flesh," said Solomon; but he, with all his wisdom, had no idea of what it was, to read through a course of legal reports, like Shaw, and Dunlop, and Macpherson; and that too, by modern and artificial gas-light. Burning the midnight oil and "out-watching the bear," is not a poetical fancy, but a sad prose reality of a lawyer's existence. He cannot help himself. But what he has to read is nothing compared with what a lawyer of the next generation will have to do, if the system of reporting and advising *ad longum* goes on as at present. Lord Campbell animadverted in the strongest terms on the practice of his Vice-Chancellor setting forth, in full detail, the whole arguments and reasons upon which he had formed his judgment. Human life, he said, was too short to review or even to read, the details of a judgment of five hundred pages. It would be well if the spirit of Lord Campbell's remark were more generally acted upon in judicial matters. What the profession wants, is the outcome and flower of the judgment; the finished, perfect pedestal, not the hidden and inner foundation of bricks, straw, and mortar, upon which that pedestal is reared. Our older race of judges knew this well. Morrison's Dictionary is full of the arguments of counsel, but the decisions of the court occupy but a small place in it, and are models of Spartan brevity. Shaw and Dunlop introduced the system of reporting the opinions of the judges *in extenso*, so that now human life is too short for reading the reports. Agents and counsel in active practice cannot do it. In consequence much bad law has been uttered and printed, and obscurity and uncertainty have crept into a science which ought to be simple and easily mastered. A court of justice is not a Porch or an Academe for philosophic and syllogistic debate and display, but a forum, for the

hearing of causes, and the despatch of business. Except in important and exceptional cases, it might be left to *one* judge to deliver the opinion of the Court. This is the practice in England.*

'In the Outer-House some minor changes might be introduced; such for instance, as the abolition of the discretionary power of agents to consent to prorogate the time for lodging papers. No such prorogation should be allowed unless by the authority of the court, and even then, once only, and on special cause shewn. Decree should follow as a matter of course, if a party failed to lodge his paper within a specified time. I would even suggest, that the provision of the Sheriff Court Act that a cause not moved in for three months shall *eo ipso* stand dismissed, should be a rule of court. This penalty has had a most beneficial effect in the conduct of business in the Sheriff Court; and would probably have an equally salutary influence in the Court of Session. When a case is brought into court, the judge, and not the agents, should be *dominus litis*, and have power to compel parties either to join issue within a certain time, or abandon the suit. The number of days for reclaiming against a final judgment might also be shortened. Twenty-one days is too long; thirteen days would be amply sufficient. The "law's delay" frightens suitors much more than the costs of the suit. That "time is money" is an axiom currently believed, and constantly acted upon, in the present age, everywhere except in the Court of Session. A merchant cannot afford to let his money lie locked up in a law-suit. No court should, by dilatory procedure, put it in the power of a dishonest suitor, to take advantage of his neighbour, by using the "law's delay" as a means of escaping from the just and prompt payment of his debts. That this is now done is well known to the mercantile community. It is a common and clamant grievance on exchange, and can only be remedied by a firm determination on the part of the Lord President and the Court, to refuse every motion for delay, and make the forms of procedure simple, explicit, and expeditious. By doing so, a vitality would be given to business, which would react on both counsel and agents, and lead to the happiest results. The sleepless energy of soul of Lord Colonsay communicated itself to the whole court; and shed light and influence like a genial sun, warming and giving life to all. It is to be hoped his example will encourage, and animate his successor to follow in his footsteps, and thus secure the gratitude of his country and the profession. M.

* We think our correspondent has made too much of the waste of time on advisings, which really occupy a comparatively short time. He has probably been led to do so by observing the great space occupied by trivial repetitions in the reports. It may be proper and expedient for judges to say much on the bench by way of illustrating and enforcing a principle or its application, which it is the duty of the reporter (even against the wish of the judge who does him the honour of revising his opinion) to sift and abridge for the benefit of his subscribers and the public. We are inclined to think that much greater obstruction to the progress of business is caused by "judicial interruptions" in the course of the debate, a practice for which the judges are perhaps not so much to be blamed as counsel. If the court found that counsel always stated their cases logically and artistically, and therefore shortly, and that in order to do so they were always well prepared and never forgot a point, it would seldom or never interrupt. It is notorious that this lesson is sometimes actually learned by judges in regard to a counsel from whom they can depend on getting the best possible argument by sitting quiet and hearing him out.—(ED. J. J.)

The Month.

The Management of Scotch Business in Parliament.—Some weeks ago, but too late for even a passing notice in our last number, Mr Baxter and some other gentlemen informed an incredulous House of Commons that the Lord Advocate was "the political dictator of Scotland," and that Scotland was dissatisfied that so much "power, patronage, and legislative responsibility," should be placed in the hands of a mere practising lawyer, who had other public and private duties sufficient to occupy all his time. Mr Baxter reminded the House that he had proposed some years ago that an Under Secretary should be appointed for the management of Scotch business, but that the proposition had not then met with the acceptance of the House; and he renewed it now because of a change of circumstances, and of representations which had been made, which, he hoped, would lead Her Majesty's Government to return a favourable answer to the question. We presume that the change of circumstances referred to is the change from a Whig to a Tory Government, and the fact that two successive Lord Advocates of the latter have been unable to find seats in Parliament. We know of no other change of circumstances likely to lead to such a result. The representations which he afterwards tells us are those "of Scotch members who represent the feelings of the Scotch people," must be those of gentlemen who, as we have long known, are discontented with the influence exercised by the Lord Advocate on Scotch affairs, and who perhaps are visited in sleep by visions of an under secretaryship, in which they may themselves enjoy the "power, patronage, and responsibility." It is certainly not true that any considerable degree of discontent prevails in Scotland with the present arrangements for the conduct of Scotch business in Parliament. Certain members of Parliament, representatives chiefly of sectional interests and extreme or crotchety views, did chafe and grumble at the legitimate influence exercised in Parliament by Mr Moncreiff, an influence which it would be a mistake to attribute entirely to the office which he held, for it was quite as much due to the fact that he was immeasurably the ablest and the most accomplished of Scotch representatives. There is also a small number of persons who are actuated by an unfortunate, but perhaps in "this pence-counting, parcel-tying generation," not an unnatural, jealousy of the *noblesse de la robe*, which is one of the most important remnants which Scotland possesses of her old national institutions. Beyond these narrow circles,—the people in Parliament who are moved by personal ambition, or personal pique at the defeat of favourite schemes, and those out of Parliament and in it who dislike, because they cannot appreciate the value of a learned profession, entire satisfaction exists everywhere with regard to the ordinary management of Scotch poli-

tical business. All, of course, cannot be perfect; but we need only appeal to the numerous comparisons between the manner in which the Scotch and the English legislation has been carried through,—comparisons generally made by Englishmen,—in order to show that, relatively at least, we have nothing to complain of, but very much reason to be pleased. No doubt the present, as well as the late Tory Governments, have been annoyed, and some inconvenience has been caused by the absence of their Lord Advocates from Parliament. But we do not imagine that Tories at least will willingly admit that to be a chronic evil; and if it were, a Tory Under-Secretary is not more likely to be popular with a Scotch constituency than a Tory Lord Advocate. We trust that the gentlemen of both parties who promote this innovation are as averse as we are to commit Scotch business to some Right Honourable quill-driver in the Home Office, who has got a seat for an English county, and knows nothing about Scotland except that it is the land of grouse and red deer. We deny, therefore, that Lord Advocates have, as a rule, been unable to attend properly to the business of the country, and we most emphatically deny that they are at a disadvantage in that respect as compared with any probable Under-Secretary. Mr Walpole, however disposed, *suo more*, to yield to any pressure however gentle, satisfactorily showed that they have not the supposed excess of power. Most people who know anything about Scotch matters know that the ecclesiastical patronage of the Crown is really exercised either by the principal heritor in any vacant parish professing the politics of the ministry for the time being, or by the congregation, the recommendation of the one or the other being almost invariably followed. As for responsibility, any probable arrangement will divide the responsibility giving us an under Secretary with the name of power, and leaving all the real work, and probably the power, where the requisite knowledge and ability will still be,—with the Lord Advocate, and leaving with him too the legal patronage,—that is really all the patronage of any value which he now possesses.

We have one remark to make from a purely professional point of view, and, addressing a professional audience, we speak frankly. The legal profession in Scotland is deeply interested that the Lord Advocate should continue to perform the political functions now committed to him. The office of Lord Advocate is a link between us and the great political world, preventing us from being altogether corrupted by that provincialism to which, by our situation and circumstances, we are peculiarly exposed: and as at present constituted it is one of the chief prizes which make the law an attractive profession for men of talents and ambition. The law of Scotland occupies locally but a narrow field, and while it remains distinct in its principles and administration from that of the southern part of the island, no intelligent lawyer can conceal from himself that it stands in need of some artificial support; so to speak, it must be subsidized. The fees paid for the litigation of Scotland will never

by themselves attract a sufficient quantity of the best talent to the legal profession. It may be said that this is a reason for assimilation and amalgamation with England; and that may come sooner or later. But in the meantime the character of the Scotch lawyer ought to be maintained at its present high standard. For this reason, among others, the double sheriffship is retained; and for this reason also we deprecate any lowering of the status of the Lord Advocate, any change which may make it unnecessary for him to be in Parliament, and which must eventually make Scotch law a less dignified and less honourable pursuit. No Lord Advocate who consents to such an arrangement as Mr Walpole seemed to think possible, will ever be able afterwards to hold up his head in the Parliament House, or to take his seat on the judicial bench without a blush. We are glad to believe, however, that the interests of the profession are safe in the hands of the present as well as of the expectant law officers of the crown, and that Lord Advocate Gordon will keep Mr Walpole from being further misled by the evil counsellors who beset him on the 23d of March.

Since the foregoing paragraphs were in type our faith in the Lord Advocate's power to protect the profession to which he belongs and the office which he might have adorned, has received a rude shock, and our exuberant confidence in his willingness to do so makes us more deeply sympathize with him in the humiliation to which we learn he is to be subjected. It is said that an Under Secretaryship for Scotland is actually created or to be created under the Home Office, and that Sir James Ferguson, M.P. for Ayrshire, is to be the first holder of the office. We have nothing to add to what we have said, except to express our disappointment and regret. We do not envy the Law Officers of the Crown for Scotland, in whose time this innovation has taken place, their silks, their salaries, or their degradation.

The Home Secretary as a Criminal Court of Appeal.—The incompetency of the Home Secretary has furnished another occasion for urging the necessity of a Criminal Court of Appeal. Mr Walpole has commuted to penal servitude for life the sentence of death passed on Edward Wager for a murder which he himself describes as "one of aggravated enormity and barbarity." Wager, a Derbyshire farmer, was accustomed to treat his wife with great brutality, so much so that one Saturday in December last she spent the night in an outhouse on the farm in order to avoid his violence. On Monday (having spent the Sunday with friends) she ventured to return to her house accompanied with a female friend named Hancock. He thrust her out of doors, abusing her for her absence; but she shortly returned and made tea. Before tea was over he again became violent, and also took liberties with the other woman. Both women then left the house. Wager followed Hancock, and insisted that she should not leave the house that night. He overtook her, when his

wife called out to him "to let her alone or she would make him remember." Upon this the ruffian left her and ran after his wife, when a fearful and unequal struggle took place, in which the woman was foully murdered, not merely by actual violence sufficient to have caused death, but in the conflict they reached the edge of the Vein Darn, where she was either pushed in or in her intolerable agony threw herself in. "A *post-mortem* examination was held, the result of which showed that there were many bruises on the woman's head, legs, and body. There was a deep wound cutting through her upper lip, and extending into her mouth and nostril. Her tongue was cut, her brain congested, her nose and upper jaw fractured, and her liver was ruptured. All these injuries were the result of blows, and the injury to the liver would alone have caused death. The proximate cause of death was drowning."

In spite of the atrocity of this murder, of which Wager's gin drinking is no alleviation, the jury, actuated it must be supposed by some peculiar theory or by an aversion to the punishment of death, added to their verdict a recommendation to mercy. Mr Walpole is not always intolerant of injustice, as is proved by his refusal to interfere in the case of Toomer, sentenced to fifteen years penal servitude for rape committed on a lady who was admittedly guilty of very extraordinary "indiscretion,"—enough, as many people thought, to show that there had been no rape at all. But he was unequal, as it would seem, to "the painful duty" of letting the law take its course when a capital sentence was passed; and accordingly recommended Wager to the mercy of the Crown. This could not but receive some notice in Parliament, and Mr Walpole's explanation of his reasons is highly instructive. It amounts in fact to this, that, being an Appellate Judge, he had a strong dislike to sanction the infliction of capital punishment, got opinions from all quarters in favour of mitigating it, and thus endeavoured to throw the responsibility from himself upon others. He referred (1) to the opinion of the Capital Punishment Commission, "that unless there was a premeditated and deliberate intention to kill—'malice aforethought' was, he believed, the expression in their report—these cases in future should not be followed by the penalty of death." This suited his preconceived view, for he says Wager did not premeditate the murder of his wife; but it is answered by the question put "with his usual sagacity" by Mr Darby Griffith—"whether the right honourable gentleman adopted it as a principle that he should give effect to the recommendation of the Royal Commissioners before legislation had taken place on the subject." Mr Walpole overlooked also another sentence in the Report in favour of continuing the capital punishment whenever murder has been "committed with a deliberate intention to kill or *do some grievous bodily harm* to the person killed." The Commissioners, therefore, instead of supporting, are directly opposed to the course which the Home Secretary has adopted. He pleads, in the second place, the opinion of the judge, which appears to have been

distinctly in favour of mercy only when Mr Walpole had, by asking his advice, cast all responsibility off his own shoulders. We deny that the Home Secretary has any right thus to transfer his own functions to the judge. It is quite right to ask the judge's opinion, but he ought not to shelter himself behind it. It is unfair to impose on the judge a responsibility which does not belong to his office. As for the third plea we cannot think that the recommendation of a jury is entitled to much weight in the face of the evidence which was given at the trial. Mr Walpole does not plead that he had any views of his own, but after his explanation we can only conclude that the pleas he puts forward are but excuses for doing what he was impelled to by his own utter weakness. The most serious aggravation of this culpable weakness is that the crime to which this misplaced leniency has been extended is wife murder; and of all vices the most difficult to check in this country is that of torturing wives. It is safer, and Mr Walpole has endeavoured to prove the fact by a very strong instance, to thrash a wife within an inch of her life than it is to steal a hare. Wife killing, according to the Home Secretary's code of morals, is by no means one of the worst forms of crime. One word more—a ruffian (Longhurst) was convicted and sentenced a few weeks ago at Kingston Assizes for murdering a little girl by cutting her throat, after having violated her, and, much to our surprise, he has since been executed. There was no premeditation there, the jury recommended mercy (juries are becoming very tender-hearted), the judge might probably have been concussed into giving a similar recommendation, and the advice of the Commissioners was as applicable to the one case as to the other. Why should not the Home Secretary have over-ridden the law of the land in this case too, and then it would have become impossible to hang anybody, these precedents having created a public feeling that after the escape of such criminals as Wager and Longhurst, it would be most inequitable to hang any one of less atrocious guilt.

Trades Unions—Hornby v. *Close.*—Our limited space has prevented us from noticing in previous numbers the important judgment of the Court of Queen's Bench in *Hornby* v. *Close*, on 16th Jan. last, 36 L. J., Mag. Ca. 43, 2 Law Rep. Q.B. 118. The effect of the decision is that a society whose purposes are entirely or partially those of a "trades union" cannot to any extent avail itself of the provisions of the Friendly Societies' Acts. We do not know whether any trades unions have transmitted their rules to Mr Tidd Pratt, and obtained his certificate (under 18 and 19 Vict., c. 63, secs. 10, 26) that such rules are "in conformity with law and with the provisions of this act," and have thus become entitled to *all* the benefits of th acts. But the most important of them have deposited their rules with the registrar under sec. 44 of the act, which provides that "in the case of any friendly society established for any of the purposes

mentioned in sec. 9 of this act,* or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar," disputes between members and the society, or between the executors, nominees, or assigns of members and the society, shall be decided in the manner provided by the acts (18 and 19 Vict. c. 63, sec. 40, 20 and 21 Vict. c. 101, secs. 5 and 6), and "the sections in this act provided for such decision and also the section (24) in this act, which enacts a punishment in case of fraud or imposition by an officer, member, or person, shall be applicable to such uncertified societies." A branch of the United Society of Boilermakers prosecuted the respondent for unlawfully having in his possession and withholding certain moneys belonging to the society, before justices of the West Riding of Yorkshire, in terms of the 24th sec. But the justices, having before them the rules of the society, which contained regulations as to piece work, &c., held that the rules set forth an illegal purpose and dismissed the complaint. A case being stated under 20 and 21 Vict., c. 43, the Court of Queen's Bench held that the magistrates were right. Cockburn, C.J., said,—

"The very purpose of the existence of this association is not merely for carrying out the objects of a benevolent society, properly so called, but those of a trades union. Now a trades union is generally understood to mean a combination of men who bind themselves not to work except upon certain conditions, and to support one another if they happen to be out of employment in conformity with the wishes and interests of the body at large. I am very far from saying that a trades union constituted for such a purpose would bring those who compose it within the reach of the criminal law; but as trades unions, so far at least as they have come under my notice, have rules and regulations that operate in restraint of trade, I think that, just as in *Hilton* v. *Eckersley* (6 E. and B. 47, 25 L. J., Q. B. 199), the combination of masters to employ only such workmen as have complied with certain conditions was held to be not criminally illegal, but illegal in this sense that the breach of an agreement relating to such a combination could not be enforced in a court of law; so here, where we have a society which appears to be constituted for the purpose of carrying out the objects of a trades union, I think that it is illegal in the meaning of the decision in that case. Some of these rules are so much in restraint of trade that were an action to be brought upon the contract or obligation to be implied from assent to them, they would without any doubt be held to be in restraint of trade, so that the action could not be maintained. I think, therefore, that for two reasons it is impossible to hold that the case is within the 9th and 44th secs. of the act 18 and 19 Vict., c. 63. In the first place, the purposes of a trades union are not purposes *analogous* to those of a friendly society properly so called; and secondly, although those who become parties to those arrangements may not be criminally responsible, and may obey

* *i.e.*, for the benefit of members, or their relatives or nominees, by way of insurance, or for any other purpose certified as proper by a Secretary of State or the Lord Advocate.

any such rules and regulations which they think fit to impose upon themselves, yet these rules, being in restraint of trades, are by the law of the land illegal and cannot be enforced."

Very naturally this decision has caused annoyance and alarm to persons connected with trades unions, many of which now involve very large interests. It is true that none of these have hitherto been certified under the acts, whether from a conviction that no registrar would give the necessary certificate, or because the societies were unwilling to be trammelled by the provisions of the acts requiring annual returns to the registrar, investment of funds in a particular way, &c. But, as we have said, they have readily availed themselves of the provision of the 44th section, which fortifies the provision generally contained in their rules for the final determination of disputes without having recourse to courts of law, and furnishes a summary means of bringing to account defaulting officials; and it is a disappointment (though one for which we think they might have been prepared) to find that the combination of the purposes of a trades union with those of a benefit society excludes them from all the advantages conferred on associations of the latter kind. We do not know that a remedy can well be expected from the Legislature. And indeed this state of the law has been foreseen, and an attempt made to guard against it by some of the shrewder or better advised unionists. We have seen the rules (and very well drawn and exhaustive rules they are) of an important trades union, containing hardly a word that could bring them within the rule laid down in *Hornby* v. *Close*; and yet there can be no doubt that the Society referred to exercises the authority of a union over its members. This may be done in virtue of consuetudinary laws established by decisions of its executive council, which are appointed by the rules to be recorded in the transactions of the society, and to be held as precedents in like cases; or more probably, as appears from the evidence lately given before the Royal Commission on Trades Unions, under secret rules or bye-laws read over to members at their admission, and not printed with the rules in general circulation and deposited with the Registrar.

It is remarkable, and indeed it is a strong indication of the prudence with which they are conducted, that trades unions have so rarely appeared in courts of law. When that does occur, many nice and difficult questions may be expected to arise. A branch of the society already mentioned (which is an English society with branches in Scotland, and has deposited its rules with the registrar of friendly societies in England, but does not hold a certificate) was lately sued for damages in a local court in Scotland in the name of the preses and secretary of the branch. The ground alleged was that the committee had wrongfully and without cause expelled the pursuer, assigning as their reason for doing so that he had returned to his work after a strike without the permission and contrary to the wishes of the committee, while there was no rule of the society authorizing the

expulsion of a member for such a cause. The affirmance of this act of the branch by the executive council in London, and the exclusion of the pursuer from a meeting, were also libelled as grounds of damage. The Sheriff, we believe, dismissed the summons as not being properly laid against the society, holding that the 44th sec. of the Act of 1855 gives no more than the privileges above mentioned, and does not confer the right of defending in legal proceedings in the name of the secretary, as properly certified friendly societies may do by sec. 7 of the Act of 1858 (20 and 21 Vic., c. 101.—See *Way* v. *Kay*, June 5, 1828, 6 S. 914). The question remains whether such actions are not excluded in respect of rules declaring the decision of the executive council to be "final," as well as by the statutory provisions. It might be contended that such disputes are not disputes between "members" and the society, the very ground on which the action is laid being that the pursuer is no longer a "member" in consequence of a wrongful act of the society. Moreover, the act of the society for which reparation is sought may be, according to the averments, one altogether beyond its competency, and in violation of the contract entered into with the pursuer when he became a member. This will raise the further question, whether in such a case malice must be averred, or whether the act for which reparation is asked being palpably *ultra vires*, or still more if an illegal purpose, in the sense of *Hornby* v. *Close* is set forth, malice is to be presumed. The judgments in *Macmillan* v. *Free Church* will of course afford many apt authorities and illustrations on this question. We only indicate some points that may be raised in such cases, because it is not improbable that actions of damages for expulsion from trades unions may ere long engage the attention of the tribunals. If the society defending is avowedly a trades union then it will be for the Court to consider whether the rule of *Hornby* v. *Close* is part of the law of Scotland, and if so, whether it applies, as we imagine it must, to exclude an action against the society as well as one at its instance. The one as well as the other arises out of a contract in restraint of trade which the law refuses to enforce at the instance either of one party or the other. Even if the society's rules do not, as in the case we have been discussing, clearly bear that it is constituted for other than benevolent or lawful purposes, then the pursuer may be personally barred by having had knowledge of illegal purposes and laws not embraced in the printed rules.

The Recovery of Book Debts Bill.—Further consideration of this bill has probably satisfied most of our readers that it is not likely, and ought not, to pass, as it has satisfied us that it would be useless for us to devote much of our space to the discussion of it. It is a crude and cumbrous production, and the Faculty of Procurators of Glasgow have done good service by the succint objections to it which they have drawn up and circulated, and the draft bill with which they have contrasted it. Their first specific objections are to the

limitation of the Government bill to Book Debts; but perhaps are not very material objections to a bill professedly intended as an experiment. Their Fourth, Fifth, and Sixth objections are the most important; and we quote them:—

IV. The provisions of the Bill are such as will assuredly defeat its professed object. The various stages which might be gone through are numerous, and afford many occasions for vexatious delay. These are, 1, A diet of appearance; 2, A continuation on "cause shown;" 3, An adjourned diet for hearing parties; 4, A diet for taking evidence, combined with the power of making remits to persons of skill, and of reverting to the old and objectionable practice of granting "commissions" for taking proofs; 5, The taking of proofs, by dictating these to a clerk, or by means of a short-hand writer, whose notes are to be written out and certified; 6, The power given to either party to demand a written record of admissions and of the evidence; 7, The adjournment of diets on "cause shown;" 8, The interlocutors containing "findings in fact and law;" 9, The appeal to the Sheriff, opening up all the previous proceedings, with power to him to order hearings before himself or the Substitute, and new proofs; and 10, An appeal to one of the Divisions of the Court of Session, involving the cost of printing the whole proceedings, and the employment of Counsel and Agents in Edinburgh. It must be quite plain, to those practically conversant with such matters, that such an Act would prove the very reverse of "Summary" in its operation, and that in cases of Appeal to the Court of Session, the expense would be as great as at present.

V. The Bill invites Appeals to the Court of Session, by abolishing the existing rule, that a party advocating or suspending a judgment of the Sheriff must find security for costs at least.

VI. The attempt, by a Statutory Schedule, to fix the Fees applicable to all causes indiscriminately, however different in their details, and this even between an Agent and his Client, is quite novel, and would in its operation be unjust. If the expense in minor causes is to be diminished, the principle on which this should be done is the simplifying of procedure, and not attempting to deprive pleaders of reasonable fees. The course proposed by this Bill can only have the effect of lowering the status of such pleaders, and thereby depriving litigants of competent assistance. Besides, it will be noticed that the provision here referred to, only applies to the remuneration of Procurators in the Sheriff Courts. When a case under the Act is appealed to the Court of Session, no limit is proposed to be put to the costs even as between party and party.

It is only fair to say that we can find in the bill no "reverting to the old and objectionable practice of granting commissions for taking proofs," the only provision as to that being an exact transcript of the words of the Small Debt Act of 1837, under which commissions are strictly limited. The expense of appeal to the Supreme Court is also exaggerated. The Faculty submit along with their Objections the draft of a Bill embodying some of the suggestions which they have on various occasions made for the simplification of procedure in causes of limited value. This bill the Faculty would apply in the meantime to all causes competent in the Sheriff Court in which

the debt, claim, or subject in dispute, is under the value of £25. The record in all such cases should be made up and closed upon the summons or petition and minute of defence as provided by the Act of 1853. The Sheriff shall proceed (the draft bill provides) to try and determine such cases "without the necessity of taking notes of the evidence further than setting forth the names and designations of the witnesses and havers adduced: Provided that he shall, when required by either party, make a written note of any questions of law arising in the course of the proof, in regard to the admissibility of witnesses, questions or documents, and of the nature of any evidence rejected, which notes shall form part of the proceedings in the cause; and it shall be competent on an appeal against the final judgment of the Sheriff Substitute, for the Sheriff to review and alter in whole or in part the deliverances pronounced in course of the proof, and thereupon dispose of or remit the cause to the Sheriff Substitute as may be necessary." Appeal is to be competent only when a final interlocutor is pronounced. "9. In finally disposing of the Cause, the Sheriff-Substitute shall distinctly and articulately set forth in his interlocutor the facts material to the disposal of the Cause which he finds established, and shall express how far his judgment proceeds upon matter of fact and how far upon matter of law, and the point or points of law he so means to decide; and the judgment thus pronounced shall be subject to appeal to the Sheriff, in so far only as the same depends on, or is affected by the matter of law, but so far as relates to the facts the same shall be held to have the effect of a special verdict of a jury finally and conclusively fixing the facts: and the Sheriff shall have power either to dispose of the case as it stands, or remit when necessary to the Sheriff-Substitute with instructions; Providing always that no judgment by the Sheriff under any such appeal shall be subject to review by any Court or by any process whatever."

The Glasgow Bill is, in our humble opinion, infinitely more business like and more practicable than the laborious and involved production of the Government. But its authors have either forgotten or have never known what are great ends of all judicial review. The liberty of appeal has two main effects. It produces uniformity of law, and for this purpose alone appeals upon points of law ought to be allowed, as in England, in cases of the most insignificant pecuniary value. Otherwise we shall always have, as we too often have now, one interpretation of the law in one country and a different one in the next. This is an evil far more serious and more common than is commonly supposed, and one to which we hope to direct our readers' attention more fully in a future number. It can only be remedied by the fullest right of appealing on all questions of law to the Supreme Court of the country. The more immediate and palpable benefit arising from the liberty of appeal is in the silent but most powerful influence which it exerts on all concerned in litigation. To some extent it is a check upon parties preventing them

from bringing unfounded cases, and upon agents compelling propriety of procedure. But its chief and most wholesome effect is on the judge, ensuring attention and preventing that haste with which the Sheriff in the Small-Debt Court, knowing that his decision is final, too often forms his opinion on difficult points of law. This benefit arises from the mere existence of the power of appeal, whether in the particular case it is exercised or not. Very few cases above L.25 are now carried to the Court of Session, and out of many thousand cases decided in the English County Courts and Sessions, only about forty are annually taken to review in the Supreme Courts upon cases stated. But if no right of appeal existed, how many more decisions in both countries would have been fit for reversal? The Government bill entirely throws away this indirect influence of the right of review by making it possible only where parties have asked for a record of evidence before either admissions are made or proof led. The Glasgow bill is somewhat better in this respect; but it errs in leaving the case or verdict upon which the judgment of the Appellate Court is to be given to be drawn up exclusively by the Sheriff-Substitute. The appellant we think ought to have the power and to be laid under the obligation of seeing that the facts and question of law are properly stated; and for this purpose there can be no doubt that a "case" in the English style is by far the best form of appeal. This method has been frequently advocated in these pages, and has been in use even in Scotland in various kinds of cases, *e.g.*, in cases under the Excise Statutes, the County Voters Act, and other statutes. The Glasgow procurators lose many if not all the advantages of a review by taking the appeal to the Sheriff instead of, as we would have it, direct to one of the divisions of the Court of Session. They seem indeed to have an exuberant confidence in Sheriffs' generally, and a child-like faith in Sheriff Sir Archibald Alison. There is far more wisdom in an article on the Government Bill which lately appeared in the *Dundee Advertiser*; and part of which we cannot do better than quote:—

"An appeal is to lie from the Sheriff-Substitute to the Sheriff, but he is not to have the benefit of any argument. The Bill only provides that when the Sheriff-Substitute's note of evidence has been transmitted to the Sheriff, "the Sheriff shall consider the same, and shall affirm or alter the judgment of the Sheriff-Substitute." The object of this seems to be that without some such provision the Sheriff-Principal, under the new law, will have almost nothing to do, and so Sheriffs may soon cease to exist. It is so ridiculous a proposal that we shall be curious to know the grounds on which it is supported in the House of Commons. Observe what it is. You have got a judgment from the man who saw the witnesses, and heard the argument of the parties or their agents, and you appeal to another man in Edinburgh, who has done neither, so that, in the opinion of the framers of this Bill, it is a positive disadvantage to hear a witness and mark his demeanour. The true way to arrive at a correct judgment is to stay away in Edinburgh, and employ a Deputy to take a note of what the witness says! There was a

time when some purpose was to be served by preserving this relic of ancient times—when Sheriff-Substitutes were officers on half-pay, indigent squires, apothecaries, or any person who could be induced to accept, for a small salary, the duty of merely keeping the judicial machine going till the Sheriff came his rounds. But now times have changed. It is no disrespect to the Sheriffs-Principal to say that in status, professional acquirements, and intelligence their Sheriff-Substitutes are at least not their inferiors. True, we occasionally find in the possession of the office some man of commanding abilities, like the present Sheriff of Haddington. But, excepting that particular case, and perhaps two others, we venture to say that there is not a county in all Scotland in which the general public would not as soon appeal from the Sheriff to the Sheriff-Substitute as *vice versa*. Perhaps there is no more difficult or important a branch of a Sheriff-Substitute's duties than the determination of questions in the law of bankruptcy; but, since 1856, his judgment is only appealable direct to the Court of Session, and we are not aware that any inconvenience has resulted from this ignoring of the Sheriff, which, by a strong effort, the mercantile community succeeded in effecting when the present Bankruptcy statute was passed."

Inverary Circuit.—Three maiden circuits in succession have now been held at Inverary, and people are again asking why judges and counsel, and we suppose macers and trumpeters, should be dragged over miles of loch and mountain to go through a useless form at a remote and solitary Highland hamlet. The answer is simply that M'Callum More would have it so. For a generation back the people of Greenock have been pointing out with irresistible logic that that town would be an infinitely more convenient circuit town for Argyleshire and Buteshire; and that it might also relieve Glasgow of a part of the criminal business which overloads the three circuit courts annually held there. Greenock is the great centre of communication for the whole district included in the circuit; so much so that witnesses and jurors from Arran and Campbeltown must go to Greenock in order to reach Inverary, and we suspect have often to pass a night on the way. About the time when Dundee was promoted to the dignity of a circuit town, Lord Advocate Moncreiff proposed to abolish the Inverary circuit, throwing Mull, Morven, and Appin into Inverness Circuit, and making the rest of Argyleshire, Bute, the lower part of Dumbartonshire, and the Lower Ward of Renfrewshire into a new circuit to be held at Greenock. The local opinion of the districts concerned was at that time expressed very strongly in favour of the project, but the veto of the Duke of Argyle, Mr Moncreiff's colleague, prevailed against the united influence of public opinion and common sense. The Dukes of Argyll were once Hereditary Lords Justice-General of Scotland, and the present Duke seems to think that some of the glory of that old office will linger round his family as long as a Circuit Court continues to be held at the village which adjoins his castle. We have great respect for such old associations, and can sympathize in some degree with his Grace's reluctance to part with an ancient distinction,—just as we would

have sympathized with the old Barons whom an utilitarian Hanoverian Government deprived by Act of Parliament of their pit and gallows after the '45. But such aristocratic predilections, and the traditional distinctions even of great Whig families must yield to the convenience of the community. The people of Greenock, Bute, and Arran, who are most nearly concerned, are again moving in this matter. A new Sheriff Court-House is now being built at Greenock, which it is not yet perhaps too late to adapt to the requirements of a circuit town, and a Tory Ministry may perhaps be more open to conviction on this point than one of which the Duke of Argyll is himself a member. The time therefore is favourable, and we hope that the effort may succeed.

RAPES.—"VINDEX," writing to the *Times* on Toomer's case, tells the following apt story:—A late eminent judge, not many years since, had to try just such a prisoner as Toomer on the prosecution of just such a prosecutrix as Miss Partridge for this same crime of rape. The judge summed up strongly in the prisoner's favour, but it was only after a very long and serious deliberation that the jury acquitted him. He was discharged by the judge in these words:—"Prisoner, you have had a very narrow escape. Next time you commit this offence, you had better get the woman's consent *in writing*."

THE DOG TAX.—The Act 30 Vict. c. 5, altering the tax on dogs, came into operation on 5th April in England, and will take effect in Scotland from and after 24th May next. All persons keeping dogs must thereafter be licensed so to do. The notice where such permits are to be obtained must be exhibited on the doors of churches by the Commissioners of Inland Revenue, or proceedings taken under the Act are to be invalid. The duty is reduced from 12s. to 7s. per annum, for the years ending 5th April 1867 for England, and 24th May 1867 for Scotland, and no person to be charged with a greater amount than L.23 2s. for any number of hounds, or L.5 5s. for any number of greyhounds, during the year. After the 5th April in England, and the 24th May in Scotland, the uniform duty of 5s. per annum will be imposed on taking out a license on every dog The penalty for keeping a dog without a licence, or for not producing such licence to be examined by any officer of excise, or police constable, within a reasonable time after demand, or for keeping a greater number than licensed, is to be L.5, and the person in whose custody, charge or possession, or on whose premises any dog "shall be found or seen," is to be deemed keeper of the same unless the contrary be proved. Dogs under the age of six months are not to be liable to the tax.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

Susp.—Randall *v.* Johnstone.—*March* 19.

Lawburrows—Suspension.

Suspension of a decree and charge to find caution of lawburrows, in a summary petition for lawburrows in the Steward Court of Kirkcudbright.

The complainer argued that the decree should be suspended, on the ground that the decree had been granted upon irrelevant averments, and *ex parte*, and that the oath of the respondent was not alone a sufficient ground to warrant its being pronounced. The Lord Ordinary on the Bills (Mure) refused the note, in respect of Barbour *v.* Hogg, 3 S. 647, and Baxter, June 16, 1827, 5 S. 752, which ruled that an allegation that they had been taken out maliciously (but not without probable cause) was not a relevant ground for suspending a charge on letters of lawburrows. The suspender reclaimed, and contended, further, that it was not competent under the Act 1449, where letters of lawburrows were sought against a stranger to the petitioner, to grant them on the mere oath of the petitioner without proof.

The Court remitted to pass the note to try the question, the suspender finding caution *ad interim* in the suspension in terms of the Steward-Substitute's interlocutor.

Act.—Young, Gifford, & Watson. Agents—Jardine, Stodart, & Fraser, W.S.——Alt.—Monro & Shand. Agents—Ronald & Ritchie, S.S.C.

Steven *v.* M'Dowall's Trustees.—*March* 19.

Expenses.

Count and reckoning at the instance of the truster's nephew and partner, concluding for accounting as to all the truster's intromissions with the firm of M'Dowall & Co. from 1850 to 1861, when a new firm was formed; and proceeding on averments that Mr M'Dowall, during that period, had appropriated a large amount of the company funds to his own use. The action was conjoined with a reduction of a balance-sheet made out in 1861, on the ground that the pursuer's signature thereto had been obtained by fraud on the part of Mr M'Dowall. The trial in April 1866 resulted in a verdict for the defenders, who obtained *absolvitor*. The case came before the Court on objections to the auditor's report. Objection to the report in so far as it allowed the charges of an investigation by an accountant into the affairs of the company for a period of nine years, repelled, on the ground that the trustees were bound in such an action to disprove the charges of fraud against their testator, and that in the most exhaustive manner. Objection by the defenders to the disallowance of the expenses in a loosing of arrestments used on the dependence of the actions repelled, on the ground

that a loosing of arrestments was a separate process, and that no change in that respect had been made by the Personal Diligence Act. Objection by pursuers to a charge for fees to three counsel repelled. But the Court held that only fees to two junior and one senior counsel should be allowed instead of to two seniors and one junior.

Act.—Shand & Bannatyne. Agents—Hamilton & Kinnear, W.S.—— Alt.—Gifford & W. A. Orr Paterson. Agents—J. & A. Peddie, W.S.

NEILLS *v.* LESLIE.—*March* 19.

Stamp—Expenses.

Action for implement of a missive of sale which was unstamped. The Lord Ordinary (Mure) appointed the document to be stamped at the joint expense of parties. The defender reclaimed, contending that, as he did not found on the deed at all, it fell upon the pursuer to pay for the stamp, although, if successful, he might recover half the expense of it (being a mutual deed) from the other party at the end of the cause.

LORD PRESIDENT—The interlocutor is ill founded, and unprecedented. When documents are not impressed with the proper stamp, no Court of Law can receive them to any effect whatsoever. The natural inference is that, when a party intends to put any writing in evidence, he must take care that it is properly stamped; and where he has not done so, it is either rejected or, as a matter of indulgence, delay is granted that it may be done. If there had been any precedent the Court might have ordered a mutual contract to be stamped at the joint expense of both the parties to it. But here the justice of the case required that the party founding on the document should bear the expense, in the first instance; and there was no precedent to the contrary. The cases founded on were not cases of interim arrangement in the course of the cause, but the question occurred where the pursuer had succeeded, and was found entitled to recover half. The principle of Grant *v.* Walker, 16th Dec. 1837, 16 S. 246, as explained by Lord Corehouse, ruled this case.

The other Judges (Lord Deas with hesitation) concurred, and the Court recalled the interlocutor, and remitted to find the pursuer bound to have the deed stamped at his own expense.—(Authorities—Smail *v.* Potts, 16th July 1847, 9 D. 1502; Flowers *v.* Graydon, 18th Dec. 1847, 10 D. 306; Law *v.* M'Laren, 20th July 1849, 11 D. 489; Logan *v.* Ellice, 6th March 1850, 12 D. 841; Wylie & Lochead *v.* Times Assur. Co., 15th March 1861, 23 D. 727.)

Act.—W. N. Maclaren. Agent—J. M. Macqueen, S.S.C.——Alt.—J. M'Laren. Agents—White-Millar & Robson, S.S.C.

APP.—DIXON'S TRUSTEES IN CAMPBELLS' SEQUESTRATION.—*March* 20.

Sequestration—Report by Trustee—Discharge refused.

In May last Campbell Brothers, and the individual partners of that company as such, and as individuals, were sequestrated. Six months after, the petitioner, John Campbell, junior, one of the partners, applied for discharge; and after the usual intimations and preliminary proceedings, the Sheriff-Substitute, on 2d Jan., found him entitled to his discharge, and appointed him to appear and make a declaration in terms of the statute. Certain creditors appealed. The nature of the case appears from the opinion of

The LORD PRESIDENT—The petitioner was required by the 146th section of the statute to lay before the Sheriff-Substitute a report by the trustee in the sequestration; and the first objection to the interlocutor is, that the trustee's report is not in terms of the statute. I think we cannot sustain this objection. The report, indeed, is not what I could have wished, yet it does not depart from the statute so far as to make it necessary to recal the interlocutor proceeding upon it. It bears that "the trustee believes that the bankrupt has made a fair discovery and surrender of his estate, that he has attended the diets of examination, and has not, so far as known to the trustee, been guilty of any collusion, but that his bankruptcy has arisen from innocent misfortunes, and not from culpable or undue conduct.—J. WYLLIE GUILD, trustee. I think the true form of such a report by a trustee is an expression of his judgment after the fullest inquiry. The word "believes" is not enough, and neither ought his opinion to be qualified by such phrases as "so far as known to the trustee." The second objection raises the question whether, in fact, the trustee's report is well founded in stating that the bankruptcy arose from innocent misfortune and not from culpable misconduct. In considering this, a few facts must be kept in view. These brothers were in business together before 1864, in which year they became bankrupt, and were discharged under a composition-deed, by which, as David Campbell in his examination says, they agreed to pay 5s. per pound on their liabilities, which amounted to £60,000. I presume that the instalments of this composition were only in the course of being paid at the date of the second sequestration. It thus appears clear that when they began business again they must have started on borrowed capital; and two years after this they came down again with liabilities, which, when compared with their assets, raise a strong presumption against their conduct. As far as the London branch is concerned, the assets and liabilities have a more favourable appearance; and I am willing to believe the petitioner's statement that the London house was solvent, if a little time had been allowed. The liabilities, he says, were £5000, and the assets £3800. But when we look at the Glasgow house this state of matters is reversed, for we find the assets to be £1035, and the liabilities to amount to the enormous sum (enormous I mean comparatively) of £181,922. If John Campbell had been living in London and managing the London business alone, and knowing nothing of his brother's proceedings as manager of the Glasgow branch of the house, that would not have been a sufficient reason for refusing him his discharge. The question is, was he in that state of innocent ignorance? *Prima facie*, there is a strong improbability that he was—an improbability so strong as to require explanation, which we have not received. It would require strong and conclusive evidence to the contrary. What was it that was going on in Glasgow? It is clear that there was going on as reckless speculation as any merchant could engage in. The correspondence—into which I do not mean to go in detail—discloses this to my mind, that John Campbell was perfectly aware of the *nature* of the speculations in which the Glasgow house was concerned. Whether he was in the knowledge of the *extent* of the speculations I do not say, but he knew that they were very large, and that his brother David was receiving a species of assistance from his father which I shall not characterise more strongly than by saying that it was illegitimate, and a betrayal of the interests of John Campbell the father's employer. His Lordship, on these grounds, came to the conclusion

that the failure of the petitioner had arisen from culpable and undue conduct, and that the Sheriff-Substitute should have refused the discharge, which the Court was now bound to do.

Lord CURRIEHILL and Lord ARDMILLAN concurred; and Lord DEAS, being a shareholder in the Commercial Bank, an appellant, declined.

Act.—Young & W. M. Thomson. Agents—Melville & Lindsay, W.S. —*Alt.—Watson. Agent—James Webster, S.S.C.*

NAPIER *v.* PATRICK, *et e contra.—March* 28.

Property—Servitude—Privilege of Angling—Singular Successor.

Conjoined actions of declarator and suspension and interdict with reference to a right of angling for trout claimed by Mr Napier of Glenshellish in the river Echaig and in Loch Eck, within the property of Mr Patrick of Kilmun. In 1829, prior to Patrick's purchase of the estate of Kilmun, Napier feued portions amounting to thirty-five acres, from the then proprietor, General Campbell, the feu-contract containing the following clause: "With liberty and privilege to the said David Napier and his foresaids of angling or rod-fishing in the river Echaig, to the westward of the ground feued by John Lamont, writer in Greenock, from the said James Gillespie Davidson, as commissioner aforesaid, and also in Loch Eck, in common with the said Alexander Campbell, the proprietor, and his other feuars, but declaring that the said privilege shall only be exercised by the said David Napier and his foresaids at the rate of one person for every four acres of the ground hereby disponed, and no further: declaring always that the said privilege of angling or rod-fishing in the river Echaig and Loch Eck is hereby conferred allenarly, in so far as the said Alexander Campbell may have right to grant the same; and that, in granting feus of other ground, the privilege shall be restricted in the same manner to one person for each four acres." In 1834 Napier purchased from the trustees of Gen. Campbell the superiority of his said feu, "with the privilege of angling in the river Echaig and in Loch Eck, in manner and to the extent specified in said feu-contract." The disposition contained procuratory of resignation, in which no mention was made of the fishings, but Napier obtained a Crown charter of resignation with precept for infeftment in the lands, "cum privilegio piscationum in fluvio Echaig et in Loch Eck, modo et ad latitudinem specificat in dict. feodo contractu, et totis aliis inibi specificat." Infeftment followed. The Echaig neither flows through nor along Napier's feu, nor is any part of the feu bounded either by the river or by Loch Eck. In 1864 the pursuer and respondent purchased from Gen. Campbell's heir, the lands and barony of Kilmun, except the portions disponed to the defender and suspender Napier, and certain other parts previously disponed to one Lawson. The disposition to Patrick contained no reservation of the right of angling in Napier's feu-contract. Patrick maintained that he was not bound by his predecessor's grant to Napier; that the right of angling in question was a personal privilege which was not binding upon singular successors. Napier contended—(1.) That the right was a separate heritable subject, capable of being disponed and feudalised, and that he had been infeft in it as a separate feudal estate, separate and independent of any lands adjacent to the river or Loch Eck; (2.) That supposing it could not

be treated as an independent feudal tenement, it was at least of the nature of a *servitude*, constituted by express grant.

The Lord Ordinary (Ormidale) held that the right was not good against singular successors. Napier reclaimed.

The Court adhered, holding that whatever might have been the result if Gen. Campbell had disponed the entire barony of Kilmun to Patrick so as to make him Napier's superior, and constitute between the two the relation of superior and vassal under the feu-contract, the case was widely different here, where Napier was his own superior, and where all connection between Gen. Campbell and his successors on the one hand and Napier as feuar on the other had been terminated by the disposition of the superiority in 1834. The dispute was between two disponees of different portions of the estate of Kilmun, and the only question was whether this right could be enforced at the instance of the one against the other. It was said to be so enforcible on two grounds—1st, As a separate subject on which infeftment had followed; 2nd, As a servitude. Now, as to the first, it was enough that the Crown charter on which the infeftment in the right had followed was a charter by progress, and could give no right not given in the previous disposition, and the previous disposition contained no warrant for infeftment in this privilege as a separate subject. Then there was, except in the case of liferent, no such thing as a *personal* servitude recognised in the law of Scotland. This, therefore, could only be regarded as a *prædial* servitude. Now, it was necessary to a *prædial* servitude that the dominant *prædium*, as a *prædium*, must derive some benefit from the servient tenement. But that could not be the case here, where the stream and loch were not contiguous to the feu, and where, moreover, the servient proprietor might practically defeat the right as a right of any value by bringing an army of anglers to compete with the holders of the servitude. The true view was, that the right was merely a permanent licence—a personal privilege; and that being so, it constituted no obligation transmissible against singular successors.

Act.—Decanus & Adam. Agents—Adam, Kirk, & Robertson, W.S.—— *Alt.—Gifford and Watson. Agents—Crawford and Guthrie, S.S.C.*

MILLER *v.* CARRICK.—*March* 29.

Entail—Montgomery Act—Irritancy.

Reduction and declarator at the instance of the heir of entail in possession of Frankfield, concluding for reduction of a lease for ninety-nine years between Carrick and the pursuer's father, entered into in 1851, or for declarator that, by failing to build a house of the value of £10 for each half-acre of ground comprehended in the lease within ten years from its date, the defender had incurred the irritancy stipulated in the said tack, and in the Montgomery Act (10 Geo. III., c. 51.) The lease in question is declared to be granted for the purpose of a gunpowder-magazine being erected on the ground by Carrick or his assigns; and it stipulates that the ground shall not be used for any other purpose than the magazine and the dwelling-houses of persons employed in managing and superintending it. It cites and bears to be granted under the powers conferred by the Montgomery Act, and in terms of the statute a clause is introduced, declaring that the lease shall be null unless dwelling-houses, in terms of the statute, be erected within ten years. But, by back-

letter of even date, the late Mr Miller declared that so long as there should be on the ground a powder-magazine of the value of £1000, it was not his intention to enforce said clause, and "so far as I legally can do so, I hereby dispense with the necessity of your building such dwelling-houses." The pursuer contended that the irritancy of the lease and the statute had been incurred, that the lease was null from the beginning, because the back-letter really formed part of it, and dispensed with a condition essential to its validity; that purgation by now erecting dwelling-houses was not proper purgation in the statutory sense. The defender mainly contended that, even if the lease were struck at by the statute, it might be restricted by the Court to twenty-five years, for which period the heir in possession was entitled under the entail to let leases for building or other purposes. The Lord Ordinary (Kinloch) held that it was a deliberate contravention of the entail and *funditus* null and void; and referred for the principles applicable to it to Mordaunt *v.* Innes, 9th March 1819, F. C. aff. 1 Sh. App. 169. The defender reclaimed; but the Court (Lord Curriehill diss.) substantially adhered.

The LORD PRESIDENT, Lord DEAS, and Lord ARDMILLAN were of opinion that nothing could now be done to save the tenant's right. It was not that the lease was *ab initio* null. *Ex facie* it was quite a good lease when granted, and the back-letter did not by itself nullify it. If within ten years from its date, the necessary dwelling-houses had been erected the lease would have been valid. But then that had not been done, and the question was, whether the tenant's failure to implement that condition of the statute did not nullify his right from and after the expiry of the ten years? Their Lordships thought it did; and, further, the irritancy thus created was not of the nature of a penal irritancy which was purgeable at the bar. It was an irritancy, attaching to the act of a disqualified person who, attempting to take advantage of an enabling statute, had failed to comply with its conditions. There was no authority for holding that an irritancy so arising could be purged, or that the period allowed by the Act for purifying the condition of the lease could be extended. The only question which remained was whether the lease should be reduced in whole or part. It had been suggested that there was a power under the Act to grant leases for thirty-one years, and that there was a power in the entail to grant leases for twenty-five years; but in the former case it was clearly agricultural leases which were contemplated; and the leases in the entail were plainly such as were granted in the course of ordinary administration and for ordinary purposes, not such as were granted for a long period as here, to enable the tenant to do an extraordinary thing—viz., to erect a large building upon the ground. To restrict the lease would, in the circumstances, be to make an entirely new bargain between the parties; and that the Court had never yet done.

Lord CURRIEHILL held (1) that, in accordance with the general rule of law, the irritancy was purgeable by the tenant—the present case not differing essentially from any other case of legal or conventional irritancy; and (2) that, even if the lease fell to be declared void as a lease for ninety-nine years, it was yet good for twenty-five years at common law, and under the entail, and therefore ought to be restricted to that period in accordance with the practice of the Court in various decided cases.

Act.—Gifford and Duncan. Agent—Robert Pringle, W.S.——Alt.—Watson and Shand. Agents—Campbell & Smith, S.S.C.

SECOND DIVISION.

CAMERON *v.* ROBERTSON.—*Feb.* 21.

Landlord and Tenant—Removing—Title to Sue.

A crofter on the estate of Lochiel sued for reduction of a summary warrant of ejectment pronounced by the Sheriff-Substitute of Argyleshire at the instance of the defenders, and for damages. The crofters on that part of the estate, of whom the defenders are a committee, have separate arable lots and hill pasture in common. They hold from year to year. The pursuer has had a croft rent free since 1847 in consideration of acting as cowherd for the others, and also a shilling a year from each crofter. He was engaged by the committee of crofters. The committee, in spring 1865, resolved to dismiss him, and one of their number intimated to him on 3rd April that he would not be required as cowherd after Whitsunday, and that he would then require to remove from the croft. On 1st June they petitioned the Sheriff for a warrant for his summary ejection, which the Sheriff, in absence, granted. The Lord Ordinary (Barcaple) reduced the decree, on the ground that the defenders, assuming them to represent the whole crofters, had no title to eject the pursuer. It did not appear, on their own statement, that they were tenants in common of the pursuer's croft, and in possession of it through him. The arrangement by which a cowherd was to occupy a croft rent free was an accommodation to the other crofters, but was also for the benefit of the landlord, as enabling him to let the other crofts to advantage. When the notice was given, the crofters had clearly no control over the occupation of the pursuer's croft for the following year. It might be that when they took their crofts for that year, by tacit relocation or otherwise, they were entitled to rely upon the landlord continuing to give them the benefit of a cowherd being kept by him in possession of a croft rent free, to give them his services for a small fee. But that would be only a claim against the landlord, and not a right in the special subject entitling them to eject the pursuer. The defenders reclaimed; but the Court adhered.

The LORD JUSTICE-CLERK had no doubt. It was not clear whether, in any circumstances, tenants under a verbal lease could pursue a summary removing. No authority had been produced to show this. But here the defenders were not tenants at all of the pursuer's croft. They had no written lease of it, nor had they possession of it under a verbal lease; and there could be no verbal lease without possession. The only person who could have legally ejected the pursuer was the proprietor. The general body of crofters had a perfect right to prevent the pursuer from taking charge of their cattle any longer; but none to eject him from his croft.

The other Judges concurred.

Act.—Watson, Rhind. Agents—Crawford Guthrie, S.S.C.——Alt.—A. R. Clark, Trayner. Agent—William Mitchell, S.S.C.

PTN.—COLLINS.—*Feb.* 28.

Poor's Roll.

The applicant brought an action of damages for personal injury against his employers, Messrs King, boiler manufacturers, in the Sheriff Court of

Renfrewshire, and obtained two judgments from the Sheriff-Substitute and the Sheriff, sustaining the relevancy, and allowing a proof. The defender advocated, and applied to be admitted to the poors'-roll. He had been on the poors'-roll in the Inferior Court; and his application was based chiefly on that ground, and on the further ground that he had been brought into this Court with two judgments in his favour, and with a view to a jury trial. He founded on Miller *v.* Gordon (10 Jur. 326.) He admitted that he was earning 25s a-week, but stated that his employment was of a precarious nature.

Lord COWAN said—I think that we cannot at present grant this application. I know no case where a man with so large an income as 25s a-week has been put upon the poors'-roll. But it is said that the applicant was on the poors'-roll in the Inferior Court. But we know nothing of the circumstances under which, or the mode in which, he was put upon the roll there; and we must form our judgment on the circumstances now presented to us. This further specialty has been stated to us, that the case has been advocated for a jury trial. But that is a mere assumption. The action may still go off upon relevancy; and it is, I think, competent for the Lord Ordinary to take the proof before himself under the recent Act. This last observation disposes of the case of Miller; for in that case issues had actually been adjusted, and the day of trial fixed before the application was presented. With regard to the apparent large amount of the applicant's income in Miller's case, it is clear that his real income was very different from his nominal income. I am therefore for refusing the application *in hoc statu*. I do not say what I may do if the case is eventually sent to a jury, and this application is then renewed.

The other Judges concurred.

Act.—A. Nicholson. Agent—J. Coldstream, W.S.——Alt.—Rhind. Agent—R. Johnston, S.S.C.

SMYTH *v.* WALKER.—*March* 6.

Letters of Horning—Execution—Interpolation—Erasure.

Reduction, improbation, and count and reckoning. Reduction was sought of a bond and disposition in security for £300, by the pursuers' father over tenements in Dundee, in 1816, to which defender acquired right, and of diligence following thereon in 1835, and decrees obtained by defender in actions of count and reckoning and declarator at his instance relating to the same matter. The grounds of reduction mainly insisted in were—1. That in the letter of horning two additions had been made between the signetting and recording—first, the words "at Croll's Rocks, in or near Dundee," as the address of the respondent; secondly, the words "sasine in favour of," in narrating the links of the petitioner's title. 2. That, in the execution of horning, the three first letters of Alexander Smith, the respondent's name, were written on erasure. 3. Incompetency in the proceedings of the Magistrates in an action of count and reckoning in the Burgh Court of Dundee. It was replied that the letters of horning were warrants and not grounds of debts, and were protected by the vicennial prescription.

LORD JUSTICE-CLERK—It was unnecessary to decide how far the hornings were protected by prescription, because the alterations were immaterial. It

was not averred by whom they were made, and the defender was not to lose his diligence on account of any unimportant mistake which might have been made by a party for whom he was not responsible. The granter of the security—Smith—was sufficiently identified without the words said to be added. And so with the other objection, the links of title connecting the party were sufficiently set forth, if the words objected to had been absent. In the execution, the objection was too critical; and, besides, the name occurred another time where the objection did not apply. It was too late, after so great a lapse of time, to examine into the regularity of proceedings in the Burgh Court to which no objection was taken at the time.

The other Judges concurred; and the Court assoilzied the defender from the reductive conclusions of the summons.

Act.—Millar, Webster. Agent—W. Officer, S.S.C.——Alt.—Gifford, Thoms. Agent—W. Miller, S.S.C.

LOCALITY OF ORWELL—QUESTION BETWEEN THE COMMON AGENT AND MINISTER AND MR RICHMOND OF COLLISTON.—*March* 8.

Teinds—Valuation—Commonty.

The question in this case was whether the teinds of portions belonging to Mr Richmond of the divided commonties of Cuthill Muir and Berrymuir were to be held as having been included in a sub-valuation obtained in 1630. The subjects in Richmond's titles are described as "All and whole the lands of Collinstain or Colliston and Strenton, with houses, biggings, yards, parts, pendicles, and pertinents of the same whatsoever lying within the Barony of Cuthill Groudie, and Sheriffdom of Perth;" and the titles of his authors since 1633 are in the same terms. The commonties were divided, and the portions in question allocated to Colliston and Strenton in 1774. Richmond maintained that the teinds effeiring to the right of commonty in the undivided commons then belonging to Colliston and Strenton must have been included in the valuation, and therefore that it included the teinds of those specific portions of the commonty which now represent the rights over the individual commonty which existed prior to the division. The minister maintained that the teinds in question were quite separate from those valued in 1630; that there was no proof that any rights of commonty were attached in 1630 to the lands of Colliston and Strenton; and that there was at all events no proof that the decree of valuation included any such pertinents of the lands valued as rights of pasturage, or other rights over an undivided commonty.

The Lord Ordinary (Barcaple) sustained the pleas of the minister, proceeding upon the construction of the decree of valuation, which did not, as in the ordinary case, ascertain the rent in stock and teind, but set forth the teind "apart and severally"—as "29 *bolls victual, twa part meall, and third part bere.*" His Lordship held that this was only a valuation of *parsonage* teind, and could not therefore include the teinds of a commonty, which must necessarily have been *vicarage*. The heritor reclaimed, but the Court adhered—Lords Benholme and Neaves taking the same ground as the Lord Ordinary, and Lord Cowan adding that, looking to the fact that the *onus* always rested on the heritor founding on a valuation, it was not proved that there was any right of property in the commonty in question belonging to Colliston and Strenton in 1630.

Act.—Cook, Duncan. Agents—Jardine, Stodart, & Fraser, W.S.—— Alt.—Clark, Asher. Agents—Leburn, Henderson, & Wilson, W.S.

SOUTAR *v.* LEIGHTON.—*March* 8.

Trust—Vesting—Payment to Account.

Multiplepoinding arising out of the following circumstances:—Alex. Leighton died in 1857, leaving a trust disposition and settlement. The trustees were directed after the death of the truster's wife, who predeceased him, to divide his whole property equally among his three sons, Robert, Stewart, and George, with power to retain the shares and apply the proceeds for the aliment of the beneficiaries, or to buy annuities, or to make advances before the period of division and adjustment, upon which interest was to be paid, and of which repayment might be demanded: declaring that the provisions were not to become vested interests until payment or application for behoof of the beneficiary; but, in the event of the decease of one son, his share was to be applied for behoof of the others. By a codicil the trustees were directed to assign the leases of certain farms to Robert and Stewart, with the crop and steading at a valuation. On the truster's death, the trustees accordingly assigned the leases. They further advanced £6000 to Stewart and George, and took security for their advances. In April 1864, a meeting of trustees was held, at which it was resolved to wind up the trust, and, with that view, to raise this action. In 1865 Stewart died, leaving a settlement in favour of Mrs Soutar. Mrs Soutar appeared in the multiplepoinding, and claimed Stewart's share, contending that the advances to him so far as not exceeding his provision had vested in him—1. Because there had been undue delay in winding up the trust; and, 2. Because his share had been paid to him, the resolution of the trustees to wind up the trust having the effect of converting the advances to the beneficiaries into payments to them in the sense of the settlement. Robert opposed the claim, on the ground that there had been no settlement of the accounts, and no payment, real or constructive, to Stewart Leighton.

The Lord Ordinary sustained Mrs Soutar's second plea, holding that the course adopted by the trustees, and particularly their resolution to wind up the trust, made the advances to Stewart payments to account. Robert reclaimed; but the Court unanimously adhered, adopting substantially the view of the Lord Ordinary.

Act.—Gifford, Spittal. Agents—Mackenzie, Innes, & Logan, W.S.—— Alt.—Young, Arch. Broun. Agent—Thomas Sprot, W.S.

MACLEAN & HOPE *v.* FLEMING.—*March* 9.

Process—Commission—Witnesses Abroad—Evidence Act 1866. *—A. S.* 1841.

On a motion for Commission to take the evidence of witnesses beyond the jurisdiction of the Court under the Evidence Act 1866, sect. 2, held that "the existing practice" prescribed by the statute is regulated by A. S. 1841, and that the examination must proceed upon affidavit and adjusted interrogatories.

Act.—Young, Mackenzie. Agents—White-Millar & Robson, S.S.C.—— Alt.—Clark, Watson. Agent—John Henry, S.S.C.

PLUMMER *v.* COMMON AGENT IN LOCALITY OF SELKIRK.—*March* 20.

Teinds—Valuation.

Mr Scott Plummer objects to the report of the common agent in so far as it holds certain of his lands to be unvalued,—among others Blackmiddings, which he alleges to have been valued along with and included under the name of Middlestead in 1636. The lands are separately mentioned in the titles from 1628 downwards. On the other hand, no separate teind has been paid to the titular for Blackmiddings. It is not now distinguishable as a separate subject; and further, in a valuation-roll of 1643 the deduction from Middlestead for feu-duty (no mention being made of Blackmiddings) is £30, 6s. 8d., being exactly the amount of the feu-duty which appears from the Crown titles to have been payable for both of the lands—viz., £24 for Middlestead, and £6, 6s. 8d. for Blackmiddings.

The Court sustained the objection, proceeding mainly on the inference to be drawn from the valuation-roll of 1643, by which it was held that the *onus* on the heritor had been discharged.

Act.—Sol.-Gen. Millar, Webster. Agents—Hughes & Mylne, W.S.—— Alt.—Cook, Hall. Agent—James Macknight, W.S.

CUNNINGHAME *v.* WEBSTER AND ROYSTON.

Tenant—Rabbits.

Advocation from the Sheriff Court of Kirkcudbright. The advocator was tenant of the shootings on the estate of Kells, and applied for interdict against the respondent Webster, tenant of the farm of Airds, and Royston, a trapper in his employment, to have them prohibited from trapping and killing game and rabbits. The respondents stated that they had never killed game, and maintained that the tenant was entitled to keep down the rabbits. Some correspondence had taken place between the parties, the general import of which was that the agricultural tenant was willing not to interfere with the rabbits if the game tenant kept them down within reasonable bounds; but he complained that that had not been done. On a proof, the Steward-Substitute held that the game tenant was bound to keep down the rabbits, and that, as he had failed to do so, the tenant was entitled to do so himself by trapping; but he held that the woods and plantations were not part of the subjects let to the tenant, and that he had no right to set his traps there. On appeal, the Steward altered this judgment in so far as concerned the woods and plantations, holding that the tenant had a right to these for pasture, and had possessed them accordingly. The Court adhered.

Act.—Fraser. Agent—W. S. Stuart, S.S.C.——Alt.—Marshall, M'Kie. Agents—Scott, Bruce, & Glover, W.S.

WATSON OR MACGOWAN AND OTHERS *v.* WATSON.—*March* 21.

Process—Summary Petition for Delivery of Deeds—Act 1693, *cap.* 35.

The respondent presented a petition in the Steward Court of Kirkcudbright praying that the advocators should be ordained to deliver to him, upon receipt and obligation for re-delivery, a feu-contract by which the

deceased Robert Watson, the petitioner's grandfather, acquired right to certain heritable subjects, and the settlement of the said Robert Watson. He described himself as heir of his said grandfather, as also of his father, John Watson, who died intestate, and of an aunt, Mary Watson, who was one of the disponees under Robert Watson's settlement. The advocators are sisters and a sister's son of the petitioner's father, also disponees under Robert Watson's settlement. Before the petition was presented, some correspondence had taken place between the parties' agents, in the course of which the advocators' agent offered to let the respondent have the deeds for three days; but in the answers to the petition, instead of persisting in and founding upon this offer, the advocators stated numerous grounds of defence, including objections to the petitioner's title to sue. The defences were repelled by the Steward-Substitute and Steward, and the two deeds were ordered to be duly recorded at the joint expense of parties; and the advocators were found liable in the expenses of process. The respondents in the petition advocated, and maintained—1. That the procedure by summary petition was incompetent—a demand for delivery of deeds ought to be made by summons; 2. That the order to record was *ultra petita* of the petition; 3. That, under the Act 1693, c. 35, the feu-contract could be competently recorded only in the Books of Council and Session.

Lord NEAVES—The last objection was not one which could be stated against the interlocutors advocated, which had directed the deeds to be duly recorded; and, moreover, was not sound in itself. The procedure was competent, and fell under the provision of Act of Sederunt 1839, where procedure by summary petition in the Sheriff-Court was authorised where dispatch was necessary, of which the Sheriff was the best judge. The order was not *ultra petita*, but the best thing which could be done.

The Court repelled the reasons of advocation.

Act.—Pattison, Dundas Grant. Agent—James Barton, S.S.C.—— Alt.—Sol-Gen. Millar, Scott. Agent—W. S. Stuart, S.S.C.

OUTER HOUSE.

(Before Lord ORMIDALE.)

KNOX *v.* YOUNG AND MACLEOD—*Dec.* 11, 1866.

Expenses—Sequestration—Trustee.

After the pursuer of an action had been found liable in a sum of expenses and the decree had been extracted, he was sequestrated. The trustee in the sequestration was sisted as a party in the action. Held that the trustee had not made himself liable for the expenses so decerned for, there being no depending process *quoad* the sum for which decree was pronounced and extracted. Torbet *v.* Borthwick, Feb. 23, 1849, 11 D. 694, held inapplicable. Acquiesced in.

Act.—F. W. Clark. Agent—L. Mackersy, W.S.——Alt.—Pattison & M'Ewan. Agent—W. Mason, S.S.C.

SANDERSON, &c., *v.* OFFICERS OF STATE—*Jan.* 22, 1867.

Succession Duty—Declarator of Legitimacy—Competency.

Moses Jacob died in 1865, leaving a settlement by which he directed his estate to be conveyed to the pursuers, whom he described as his natural

children. The trustees tendered payment of duty at 1 per cent., the amount payable by lawful children. The Inland Revenue claimed 10 per cent., and the trustees were sued at the instance of the Lord Advocate. The children raised this declarator of legitimacy against the Officers of State, averring a marriage by habit and repute between their father and mother. The Officers of State pleaded that the Lord Advocate only, and not the Officers of State, was the proper representative of the Crown in a question of revenue, and that the action was therefore irrelevant.

This preliminary defence sustained, and the action dismissed. Acquiesced in.

Act.—Webster. Agent—James Finlay, S.S.C.——Alt.—Scott. Agent —James Hope, W.S.

HOUSE OF LORDS.

LINDSAY *v.* OSWALD.—*March* 21.

(In the Court of Session, Dec. 11, 1863, 2 Macph. 210.)

Entail—Prohibition against Alienation—Erasure.

The circumstances of this case appear from the report in the Court of Session, and from the opinion of

The LORD CHANCELLOR (Chelmsford). This action was raised by the trustees of Richard Alexander Oswald to have it declared that they, as such trustees, were entitled to hold his whole estate, heritable and moveable, according to the terms of his trust disposition dated 1838, and to reduce and set aside certain deeds inconsistent therewith. The defenders were the heirs of entail under a deed of tailzie dated 1790, under which R. A. Oswald held the estate. They alleged in their defences that the truster held his estate under the deed of entail of 1790, and that deed prohibited him from alienating or selling the estates. That deed of 1790 was made in pursuance of a prior deed of 1780, but it must be regarded in this case as an independent deed, and was not to be treated as referring to or incorporating any prior deed. The tailzie of 1790 contained the three usual prohibitions against contracting debt, against selling or alienating the estate, and against altering the order of succession. Now, the prohibition against alienations contained the word "irredeemably" written on an erasure, and that being an essential word, this vitiated the whole prohibition. Thus there was no effectual prohibition against alienating the estate, though there were prohibitions against contracting debt or altering the order of succession. Therefore, the question was whether this trust disposition made in 1838 by an heir of entail who was capable of alienating, was really a deed of alienation, or was merely a deed altering the succession. Now, it was a *mortis causa* deed, and the purposes are to pay the debts and legacies, and give the liferent to the widow, and then to other parties. The appellants (and pursuers) contended that it was a deed of alienation; because the trustees were singular successors, and because the deed directed the conversion of the heritable estate into money, so that

it was a virtual alienation. No doubt many of these cases might be so put as to raise great difficulties—for deeds of alienation in one sense always involved an alteration of succession, and deeds altering the succession might assume the appearance of a deed of alienation, but what was said by Lord Fullerton in the Countess of Dalhousie's case was very appropriate to this case, for he said that a deed which left the owner in full possession of the estate, and only gave it to a third party at his death, was not in the proper sense a deed of alienation. Now, in this case the trust disposition was not to operate until the death of the maker, and it was impossible to deny that the main object was to divert the estate into a different channel. Therefore, when Lord Fullerton agreed with the Judges in the Court below as to the character of this kind of disposition, there was such a weight of authority in favour of the respondent that his Lordship had no hesitation in affirming the interlocutor of the Court below.

Lord CRANWORTH—Before Lord Rutherford's Act, if a deed of entail was defective in one prohibition, it was nevertheless valid as to the others; and this deed not being affected by that Act, the question was whether it offended against the prohibition as to altering the succession, which prohibition was still valid. Now, it was a *mortis causa* deed, so far as affected these lands, and it was a deed of succession, and not of alienation. A distinct meaning ought, if possible, to be given to such a class of deeds. Deeds of alienation were distinguishable from deeds of succession. There could be no alienation if the deed did not operate till after the death of the owner. It really made no difference that the deed directed a sale of the estate after the death of the owner.

Lord WESTBURY was glad that it was to be assumed that the prohibition against alienating was vitiated by the erasure, and that these lands were to be assumed to be included in the deed of 1838 if it was a deed of alienation. It was settled law that an heir of entail had the rights of a fee simple proprietor, unless so far as he was restrained. The question was if this was a deed of alienation and not a deed affecting merely the order of succession? He thought it was a deed affecting the succession; because, first, the life-rent was reserved; secondly, it was *mortis causa;* thirdly, it was expressly made revocable, even on death-bed. Could it be properly said that such a deed was one of alienation, when it was to have no operation till the settlor's death? He thought not. The only object and end of it was to regulate the succession.

Lord COLONSAY had little to add. This deed partook of the form of a deed of alienation, but did not cease to be a deed of succession merely because of that. It was made expressly for the purpose of settling the affairs of the settlor after his death. It was revocable. It reserved the maker's life-rent, and it was gratuitous. It was not a *de præsenti* conveyance. The maker did not divest himself of the estate during his life. He did not give it over to any third party. It was not a deed of alienation, therefore, within the statute of 1685. He gave no opinion as to the effect of the word "irredeemably" being written on an erasure, and he gave no opinion on the point whether the general trust disposition carried an estate which was held under a special deed of entail, as the latter question might probably come before the House at no distant date.

Affirmed.

Act.—J. Anderson, Q.C., Young.——Alt.—Att-Gen. Rolt, A. R. Clark.

BRUCE AND MITCHELL *v.* PRESBYTERY OF DEER.—*March* 22.

(In the Court of Session, Jan. 20, 1865, 3 Macph. 302.)

Succession—Legacy—"Poor of the Presbytery"—Expenses.

The appellants contended that a bequest to "poor of this Presbytery" was void, from uncertainty. The law of Scotland was different from that of England on the subject of charitable bequests, for there was no statute of mortmain nor doctrine of *cy-prés*, nor statute of charitable uses. In all the cases hitherto there had been a certainty in the legatees and in the object of the bequest, but here there was neither. None of the cases in Scotland went so far as this. There was neither a definite object in the subject nor the machinery to act in administering the charity, nor did the will give any means of reducing the uncertainty to certainty. The objects of the bounty were "poor of this Presbytery"—not "the poor," but simply "poor." It might be poor Christians, poor gentlemen, poor women, poor children, or poor anybody that was meant. Then "Presbytery" was a vague and shifting term. Which Presbytery did it mean—the Established Church, or the Free Church, or the United Presbyterian?

LORD CHANCELLOR (Chelmsford)—The question turned on the construction to be put on a clause in the will of Mr Bruce: "The whole of the balance of my property I leave to poor of this Presbytery, to be divided—I mean interest, by the sessions of the several churches, but to be paid to all Christians except Roman Catholics." The next of kin contended that this bequest was void. It was clear that it was intended as a charitable bequest, and it must be carried out if the general object of the testator could be ascertained. When it was stated that charitable bequests must always receive a benignant construction, this merely meant that when two constructions might be put on the will, one of which would render the bequest void and the other would make it effectual, then the latter was to be adopted. Here the subject, the object, and the administrators were defined with sufficient certainty to enable the Court to carry out the bequest. The subject was the balance of the property. The object was "poor of the Presbytery;" for though the definite article was omitted, it was the same thing as if it had not been omitted, so that the poor of the local territory included in the Church Court called the Presbytery were the parties to be benefited. The kirk-sessions were intended to be distributors of charity; and, of course, that must mean the sessions of the Established Church.

Lord CRANWORTH had not a word to add, except that the only doubt he had was as to whether the House had not been too lax in allowing the costs of parties claiming the fund to be paid out of the fund, as it seemed to encourage parties to raise litigation in cases where the chances of success were desperate, as they undoubtedly were in the present case.

Lord WESTBURY said he agreed in the conclusion arrived at as to the construction of this bequest, and also in the observation of Lord Cranworth about costs.

Lord COLONSAY said he was happy to add that in disposing of this case, their Lordships were not confining the benefit of this charitable bequest to what were called the legal poor of the Presbytery. That point was not now before the House. If the definite article had been used, and

the objects of the bounty had been called "the poor," possibly it might be contended that that meant the legal poor, but that point was not at all in question now, and nothing whatever was decided about it.

Affirmed. The costs of parties to be paid out of the estate of consent of the respondents.

Act.—Att.-Gen. Rolt, Anderson, Q.C., & Skelton.——Alt.—Sir R. Palmer, Q.C., Young, & Cheyne.

JOHNSTON *v.* DUNLOP, AND OTHERS.

(In the Court of Session, March 24, 1865, 3 Macph. 758.)

Husband and Wife—Post-nuptial Settlement—Sequestration—Donatio inter virum et uxorem.

Declarator and reduction brought by the respondent, trustee on the sequestrated estate of G. M. Dunlop, against the bankrupt and his wife, the appellant, and her marriage-contract trustees. In 1861 Dunlop commenced business as a partner of the firm of Mackintosh, Dunlop, & Co., which was dissolved in 1862 by mutual consent, being then indebted to the amount of £4000. In Nov. 1862, Dunlop commenced business on his own account, and so continued till his sequestration on 6th Aug. 1863. On 29th March 1861, Dunlop and his wife, who were married in 1860, both being in minority, executed a post-nuptial contract, whereby the husband bound himself to pay, for behoof of the wife, £5000 to trustees, who were to pay the income to the wife during her life for her aliment and that of her family, such income being declared alimentary, and not affectable by her deeds or debts, or by creditors of the husband. In the event of her death, the trustees were to hold half of the capital—namely, £2500—for the children, and to pay the other half to the husband. On 25th Dec. 1862, they executed a supplementary contract, conveying to the trustees certain securities in implement of the obligation in the marriage-contract, and varying the destination of the £5000. The trustees obtained payment from Dunlop of the sum of £5000, and became vested in the securities.

It was contended by the pursuer and respt. that the post-nuptial contract was *donatio inter virum et uxorem*, and revocable, and was revoked by the husband's sequestration, and that the provisions were not reasonable and moderate, considering the circumstances of the husband, so that the trustee was entitled to the fund.

The Lord Ordinary (Barcaple) and the Second Division held that the provision, in so far as the income was directed to be paid to the wife during the marriage, was a donation *inter virum et uxorem*, and was revocable, and was revoked by the sequestration. The defender (Mrs Dunlop) appealed, contending that the marriage contract provision could not be revoked by the bankrupt, or by the trustee for his creditors, because the bankrupt, at the date of his sequestration, was absolutely divested of the property in question in securing and implementing his natural and legal obligation to provide for his wife and children during the marriage, as well as after its dissolution, or his death; and that the provision was onerous, being granted by the bankrupt, and accepted by the appellant, in lieu of her common law rights. The bankrupt had deserted her, and this was the only fund upon which she could come for the support of herself and her infant child.

(Authorities—Turnbull *v.* Turnbull's Trs., 1 W. and S. 80; Smitton *v.* Tod, Dec. 12, 1839, 2 D. 225; Wright *v.* Harley, June 2, 1847, 9 D. 1151; &c.)

Lord Chancellor (Chelmsford) said the appellant could show no ground on which the post-nuptial settlement in favour of the wife could be maintained. This decision proceeded on the particular circumstances, and did not determine that in no case could a provision for the maintenance of the wife be made during the subsistence of the marriage. The Lord Justice-Clerk and Lord Cowan expressly guaranteed themselves against any such doctrine. In the cases cited, the deeds were onerous, and not revocable. The action applied only to the provision for the wife during the marriage. Though the wife renounced her *jus relictæ*, that did not make the contract onerous. There was no natural or legal obligation on the husband to divest himself of any portion of his property or to put it out of his control in order to provide for his wife and children. On the contrary, it would rather appear to be his natural duty to preserve his right as head of the family, and not to deprive himself of the exercise of any discretion by making an irrevocable provision for his wife and children. The renunciation of legal rights on the part of the wife only came into operation at the death of the husband, and that did not make this an onerous contract.

Lord Romilly and Lord Colonsay concurred.

Appeal dismissed, without costs, appellant suing *in forma pauperis*.

ENGLISH CASES.

Shipping—*Bill of Lading.*—Cotton was shipped in India for London. The master signed three parts of a bill of lading, which the consignor deposited with a bank as a security for an advance. The consignee entered the cotton for delivery at a sufferance wharf, and it was there delivered, subject to stoppage for freight. Plaintiff advanced money on security of the cotton (which he did not know had arrived) to the consignee, who thereupon obtained the three parts of the bills of lading from the bank, but delivered only two to plaintiff, and afterwards fraudulently deposited the third with defendants for another advance. Defendants obtained possession of the cotton, whereupon plaintiff brought his action:—*Held*, that the bill of lading was in force at the time of deposit with plaintiff, that he had as valid a pledge as if the cotton itself had been delivered to him, and that he was entitled to succeed in his action against defendants. "On the part of the defendants, it is said that the paper on which plaintiff had made the advance, although appearing to be a bill of lading, was in reality only a piece of waste paper which had been a bill of lading, but which was extinct, though it bore still the semblance of what it was in its lifetime; and the question is whether that can be maintained. Or, putting it in plainer words, the question is whether a bill of lading ceases to have any operation after the goods are landed, even although they remain on the wharf on which they have been placed by the master as security for the freight. And I am of opinion that the bill of lading is in force, at least so long as complete delivery has not taken place to any person claiming thereunder; and I believe that that will be found to be not only law, but also in accordance with the practice and convenience of merchants."—Per Willes, J. The Act 25 and 26 Vict., c. 63, s. 67, foll. (Merchant Shipping Act Amendment Act 1862), makes no change in the rights of holders of bills of lading. [Note for Reference: 18 and 19 Vict., c. 111; *In re Westzinthus*, 5 B. and Ad. 817, 3 L. J. N. S., K. B. 56, 2 Ross L. C. 130.]—*Meyerstein* v. *Barber*, 36 L. J., C. P. 48; 2 L.R., C.P., 38.

PRINCIPAL AND AGENT.—Plaintiffs, commission-agents at Mauritius, sued defendant for breach of agreement to accept sugar, which they had bought on his account. It was admitted on record, that defendant had sent plaintiffs an order to buy and ship for him 500 tons, at a price covering cost, freight, and insurance, "50 tons more or less of no moment, if it enables you to procure a suitable vessel;" that it was the usual course of business at Mauritius, in executing so large an order, to buy such quantities as could be procured from different persons there; that it was impossible to buy such a quantity of one seller, or at one time, or by one contract; that plaintiffs bought 400 tons of the sugar at a price, according to the current freight, within the prescribed limits, but could not, while shipment was at this rate, purchase any further quantity within these limits; and that more than a reasonable time elapsed without their being able to complete the order, and before then defendant wrote, directing them not to purchase the sugar:—*Held*, first, that the words "50 tons more or less," &c., might be excluded from consideration, as intended only to prevent plaintiffs from being hindered in getting a suitable vessel; secondly, that plaintiffs having acted properly as agents, were entitled to require defendant to accept and pay for the smaller quantity of sugar they had purchased.—*Ireland* v. *Livingston*, 36 L. J., Q. B. 50; 2 L.R., Q.B. 99.

PRINCIPAL AND AGENT—*Order to Purchase Goods—Divisibility of Order.*—Defendant in Liverpool, directed plaintiffs, brokers in Pernambuco, to purchase cotton for him. The order was in a letter, in which defendant, after confirming a previous order, and expressing a hope that it had been fully executed, said that, if executed, the letter was to be regarded as a new order for one hundred bales more at a price named. He subsequently wrote, directing plaintiffs to re-sell on the spot any cotton they might have bought on his account; but this did not reach plaintiffs till after they had shipped for defendant ninety-four bales of the quality and price ordered, and six of a second quality, and had written to him stating that if he did not wish to take the six bales of seconds, their agent in Liverpool would take them. Defendant refused to accept or pay for any of the cotton, on the ground that his order had not been properly executed:—*Held*, that enough appeared from the facts and correspondence to enable the Court to infer that, from the state of the market at Pernambuco, it was impossible for plaintiffs to purchase one hundred bales of the required quality and price in one lot, and that the parties must have contemplated this; and that defendant intended, and plaintiffs understood, that they were to purchase the cotton as they could meet with it in smaller quantities, not exceeding in all one hundred bales; and therefore they were justified in purchasing the ninety-four bales; and if they could not procure six more to make up one hundred bales, defendant was bound to pay for the ninety-four.—*Johnston* v. *Kershaw*, 36 L. J., *Ex.* 44; 2 L.R., Ex. 82.

SHIPPING—*Liability of Owner—Charterparty.*—Plaintiffs shipped goods in defendants' vessel, without knowing that she was sailing under a charter-party. By this charter-party the vessel was to load at the port where plaintiffs' goods were shipped, a full cargo from the factors of the affreighters. The freight was to be 18s. per tun of 252 gallons; should other goods than wine be shipped, the freight to be at the same rate on the quantity of wine the vessel would have carried, the quantity to be ascertained by a stevedore to be appointed by the charterer's agents and the master. The cargo to be brought to and taken from alongside the vessel at the merchant's risk and expense; the captain to sign bills of lading at any rate of freight without prejudice to the charter, and the ship to be addressed to the charterers at the port of loading on the usual terms. The charterer's agents put up the vessel as a general ship, and plaintiffs shipped goods on board of it and received bills of lading from the master, without notice of the charter-party. These goods, which were stowed by stevedores appointed and paid by the charterer's agent, who received back the amount so paid from the master, were damaged from improper stowage:—*Held*, without deciding as to what might be the liability of the charterer, that there was no demise of the ship to him, but

that it continued in possession of the owners, through the master and crew, who remained their servants. That so long as the master remained in the service of the owners, he might reasonably be presumed by those who shipped goods in ignorance of the arrangements as to the charter of the vessel, to possess the ordinary authority to sign bills of lading as agent of the owners, who were therefore responsible to such shippers for improper stowage. Per Cockburn, C.J.—"We proceed on the well-known principle that where a party allows another to appear before the world as his agent in any given capacity, he must be liable to any party who contracts with such apparent agent within the scope of such agency. . . . It may be that, as between the owner, the master, and the charterer, the authority of the master is to sign bills of lading on behalf of the charterer only, and not of the owner; but in our judgment this altered state of the master's authority will not affect the liability of the owner, whose servant the master still remains clothed with a character to which the authority to bind the owner by signing bills of lading attaches by virtue of his office. The burthen of proof must fall on the shipowner claiming the exemption from liability; he must show that the shipper had notice of the charter, and was aware that in making the contract the master was agent for the charterer."—*Sandeman* v. *Scurr*, 36 L.J., Q.B. 58; 2 L.R.Q.B. 86.

CHARTER-PARTY—*Calculation of Freight—Usage.*—By charter party made in London between plaintiff and defendants, Liverpool merchants, it was agreed that plaintiff's ship should sail to Bombay for a cargo of cotton or wool, and having loaded, should proceed to London or Liverpool as ordered, and deliver the same on being paid freight as follows, viz., "75s. per ton of fifty cubic feet delivered for cotton or wool." It is the practice at Bombay to compress the bales of cotton before shipment by machinery into the smallest possible space, and on being unloaded they expand considerably. The plaintiff claimed to have the freight calculated according to the measurement of the bales after being unloaded, and brought his action for balance of freight still due to him according to this mode of calculation. Evidence was given of a usage in the Bombay trade by which freight was payable, under charter-parties in similar terms to that in question, upon the measurement of the bales before shipment; but no direct evidence was given to shew that the plaintiff was aware of this usage:—*Held*, that, apart from the evidence of usage upon the true construction of the contract, the freight was payable on the measurement before shipment, and that the evidence of usage was admissible as not contradicting the terms of the charter-party. Per *Kelly*, C.B., and *Pigott*, B.—Under the circumstances the plaintiff might fairly be presumed to have been acquainted with the usage.—[Note for Reference—*Gibson* v. *Sturge*, 10 Ex. 622, 24 L. J. Ex. 121; *Kirchner* v. *Venus*, 12 Moo. P. C. 361.] *Buckle* v. *Knoop*, 36 L. J. Ex. 49.

FRIENDLY SOCIETY—*Trades Union.*—A society of workmen purported to be established for the purpose of making allowances to such of its members as may be ill, disabled, or out of employment, but adopted, besides rules for that purpose, rules giving aid to members resisting a reduction of wages upon proof, to the satisfaction of the executive council, that the firm is reducing the prices below the usual and reasonable prices, and imposing fines on members holding communication with any shop where a dispute has arisen connected with the society or the trade of its members, and upon members using their influence to obtain employment for non-members.—*Held*, that such rules being in restraint of trade could not be enforced by the law of the land, that the society was not a friendly society established for any of the purposes mentioned in 18 & 19 Vict., c. 63., s. 9, nor for any purpose which is not illegal within the meaning of section 44 of the same act; and, therefore, was not entitled to the benefit of the summary powers conferred by section 24, for the punishment of members of a friendly society fraudulently withholding money, &c. *Hornby* v. *Close*, Q. B., 36 L. J., Mag. Ca. 43; 2 L. R. Q. B. 120.

THE

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RECENT DECISIONS IN THE LAW OF PARTNERSHIP AND JOINT-STOCK COMPANIES.

(*Continued from last Number.*)

Contributories.—The great importance of the question, who may be made a contributory, has produced more decided cases on this than on any other branch of the Act of 1862. The general principle appears to be, that no one can be made a contributory, in the first instance, who is not at the time of winding-up a member *de facto* of the company; and that if any one fall under this category, no latent equities, however much they may entitle him to indemnity, will avail to prevent his name from being placed on the list of contributories. The soundness and equity of this rule become apparent, when it is borne in mind that the primary object of a winding-up order is for payment of company creditors, and that the adjustment of the rights and claims of the members among themselves, though by no means to be lost sight of, is a matter of secondary importance only. Now, the public deal with a registered company on the credit of those whose names appear regularly on the roll of its members, and on the credit of no others. With such questions as what induced them to become members, or why, having made arrangements for demitting their shares or transferring them to others, these arrangements had not been fully carried out, the public have really nothing to do. For the like reasons, if certain persons have been made members by a due compliance with all the forms appointed for that purpose, the public must accept them as they are, and

have in general no right to complain that others possessed of more means had not been obliged to remain in the concern, or had not been substituted for those who are *de facto* members. In general, too, it is plainly the interest of the other contributories that any person, who has to appearance been regularly made a member, should be placed on the list of contributories. It may be that he has been misled by others, that his transferree has not chosen to complete the transfer, that he has become a shareholder individually, when he only meant to appear as a trustee. In such, and the like cases, he ought to have a claim of relief against those through whose misconduct he suffers; but it is evident that if a winding up were to be made the arena in which such questions were to be determined, uncertainty, protracted litigation, and ruinous expense would often follow, and the body of contributories, not less than the public creditors, would be the sufferers. The following cases may be noticed as illustrative of these principles.

In re The Llanharry Hœmatite Iron Ore Co. (Limited), *Ex parte* Tothill, Dec. 6, 1865, it was decided that when all the requisites to vest a party with shares have not been complied with, he cannot be made a contributory, and that general evidence of knowledge or intention on his part will not by itself be sufficient. On the other hand, when the requisites required for a valid transfer have been duly complied with, the transferror will be relieved from liability to be made a contributory, even though the consideration stated be false, and though the transfer was probably made with the view of escaping from liability. This, however, would not be the case when the transaction was *plainly* fraudulent, *e.g.*, when a member had assigned his shares to a pauper or a servant, with the view of avoiding payment of his own share of the company liabilities, and of throwing an additional burden on the other contributories. *In re The Hafod Lead Mining Co.* (Limited), Feb. 19, 1866, 35 Law Jour. (Ch.) 304. In all such cases, however, the transferror will only be relieved from liability to be made a contributory when all the forms required for a valid transfer have been duly fulfilled. Thus *in re Overend, Gurney, and Co., ex parte* Walker, Aug. 3, 1866, 35 Law Jour. (Ch.) 826, where after a banking company had stopped payment, but prior to any order or resolution for winding up, Walker executed a *bona fide* transfer of his shares in favour of Robinson; yet the transfer was not executed by the transferree, nor approved of by the directors, nor registered in the books of the company as required by the articles

of association; it was held, on an application by Walker to remove his name from the register and substitute that of Robinson, that the Court could not dispense with the regulations, and that Walker must remain a contributory whatever claim of indemnity he might have against Robinson. Sometimes it is provided that before a transfer can be completed it must receive the sanction of the directors. In such cases they will have reasonable time to make up their minds; but they must not be chargeable with undue delay. Now, if in a case of this kind a transfer has been made, and while the directors are considering whether they will sanction it, a petition for winding up is presented, the mere fact that the directors do not accord their sanction to the transfer for a day or two after presentation of the petition will not have the effect of relieving the transferree from liability to be made a contributory, provided it appear that no undue delay has taken place. *In re Joint-Stock Discount Co.*, Sheppard's case, Nov. 3, 1866, 2 Law Rep. (Ch. Ap.) 16, affirming V. C. decision, July 1866, 35 Law Jour. (Ch.) 626.

It seems to be a principle now firmly settled, that directors, managers, or other officials have no power to act or contract on the part of the company beyond the sphere of their authority either express or plainly implied. When they do this, their actings are mere nullities unless for subsequent ratification when that is competent. This principle draws after it certain consequences of importance in ascertaining who are contributories. Thus if the company pass a resolution that certain shares may be allotted to executors of deceased shareholders, and instead of following out this the officials allot them to a person not in that character, the mere fact that his name is entered in the register as owner of the shares will not make him liable as a contributory, unless it can be shewn that the company had before the winding up ratified the transaction. See *The Leeds Banking Co., ex parte Mallorie*, 36 Law Jour. Ch. 141. In like manner, if directors take upon them to remove the names of persons who have signed the memorandum of association from the list of shareholders, and to substitute others in their room without the consent of the company, such a transaction will have no legal effect whatever. See *In re The South Blackford Hotel Co.*, Niegiotti's Case, Rolls Court, 26th April, 1867.

We have already stated that gross misrepresentations in the prospectus will have the effect of rescinding a contract to take

shares. A good example of this will be found in *Ross* v. *The Estates Investment Co.* (*Limited*), Nov. 19, 1866, 36 Law Jour. Ch. 54. Here the prospectus of the company stated that more than half the shares issued had been subscribed for, and that the company had contracted for the purchase of two estates, upon one of which the vendor had expended a large sum in improvements. Instead of this it turned out that the chief promoter had agreed to take by himself or his nominees more than one half the number of shares issued, but that he had before allotment carried these shares into the market, and that the directors had not required him to perform his agreement; that the seller to the company had not himself expended a shilling in improvements on the one estate, though the person from whom he had purchased had done so, and that he had entered into merely a verbal contract for the purchase of the other estate. The Court held that the statement in the prospectus, though true to the letter, was in substance a gross misrepresentation put forward to mislead the public, and that the plaintiff was entitled to have the allotment of shares to him cancelled. See also *Stewart* v. *Austin*, Nov. 23 1866, 36 Law Jour. Ch. 162. *Kisch* v. *Venezuelan Railway Co.*, H. of L., May 14, 1867. It must be noted, however, that in none of these cases was the question raised in a winding up. If such had been the case it is probable that the parties would not have been removed from the list of contributories, but would have been left to take their remedy against those by whose misrepresentations they had been deceived. To remove from the list of contributories the names of those who had been induced to become shareholders, even by the grossest misrepresentations, would in many cases be not to punish the wrong-doers, but the public.

It may here be noticed that a contract to purchase shares may be enforced, even though, before decree is pronounced, a winding up order has been made. Thus in *Pain* v. *Hutchison*, Dec. 5, 1866, 36 Law Jour. Ch. 169, the plaintiffs, who were stock and share brokers, having contracted to buy certain shares in a company standing in A.'s name, agreed to sell the same to the defendant's broker, but the defendant's name was not given at the time of agreement for sale. On the settling day the name was given to the plaintiffs, and the money for the shares was paid them. The transfer was executed by A., but this the defendant refused to do, alleging that he never intended taking the shares in his own name, and that his broker had, without authority, given

his name to the plaintiffs in order that it might be registered. The plaintiffs then filed their bill against the defendant for specific performance of their contract with his broker; but before the cause came on for hearing, an order was made to wind up the company under supervision of the Court. It was held, however, that notwithstanding such order, the plaintiffs were entitled to decree against the defendant for specific performance. The power of the Court in such matters is however entirely discretionary; and accordingly, while it is held that a *bona fide* sale of shares, made after the presentation of the petition to wind up, but before advertisement—the parties being ignorant of the position of the company—may be supported by the Court in the exercise of its discretionary power under Sec. 153 of the Act of 1862, the Court will not compel a purchaser to complete the sale and register the shares in his name, if the transaction be incomplete. *London Hamburgh and Continental Exchange Bank (Limited)*, Emmerson's case, June 1866, 36 Law Jour. Ch., 177.

There is no power more liable to abuse than that of forfeiting shares; and that not merely against, but too often in favour of, the shareholder. The latter abuse is very apt to manifest itself when a company becomes insolvent, and the shareholders are about to be made contributories. Sometimes a shareholder voluntarily places himself in a condition to incur forfeiture—sometimes he succeeds in inducing the directors to aid him in this fraudulent design. The Court accordingly regards all forfeitures or expulsions which take place when the company is in difficulties, or on the eve of being wound up, with great suspicion, and will not give effect to them when corrupt motives can be made out. To a valid forfeiture it is therefore required that it be absolute and unconditional, and that all the statutory or conventional requisites have been fully implemented. See on this subject *The East Konigsberg Mining Co.*, (Limited), Dec. 1865, 35 Law Jour. Ch. 216; *The North Hallenbeagle Mining Co.*, Knight's case, Jan. 18, 1867, 2 Law Rep. Ch. Ap. 321; and *The Agricultural Cattle Insurance Co.*, Stanhope's case, Jan. 19, 1866, 35 Law Jour. Ch. 296.

In the case of the *London, Hamburgh, & Continental Exchange Bank (Limited)*, May 2, 1866, 35 Law Jour. (Ch.) 652, some very important dicta will be found in relation to transfers of shares made about the time of winding up. In that case it was held that a sale of shares in a company made after presentation of a winding up petition, but before its advertisement in the *Gazette*, will be

sustained where the transaction appears strictly *bona fide*, and the vendor had, at the time of the sale, no knowledge of the infirm state of the company. The first appearance of the advertisement was stated to determine the position of all parties. It was likewise decided that, where a company makes a transfer of shares held by it in another company known to be insolvent, into the name of a trustee, the Court will not sanction the transaction if it appears to have been entered into for purposes of concealment.

Questions of considerable difficulty sometimes present themselves when it is asked whether a shareholder, who is also a creditor of the company, is entitled either to set off, or to have credit for, so much of his debt as is equal to the amount of calls made upon him, and to receive a dividend on the balance. Such questions depend entirely upon the construction of the Act of 1862; for whether registered companies be or be not, like ordinary partnerships in other matters, it is clear that when they are wound up under the Act, the rights of the company and its shareholders must be regulated thereby. Now, a distinction has been taken between the cases of unlimited and limited companies in this respect. In companies with unlimited liability, a set-off upon an independent contract is allowed to a member against a call, even though the creditors have not been paid (Sec. 101), and that for the very sufficient reason that, as he is liable te contribute to any amount until all the company liabilities are satisfied, it is of no consequence whether a set-off is allowed or not. The case is very different when the company is limited. Here, if compensation were allowed between a debt and a call, part of the fund applicable to the payment of the company creditors would be withdrawn from them altogether; for example, if a debt due by the company to one of its members should happen to be exactly equal to the call made upon him, he would be paid twenty shillings in the pound upon his debt, while the other company creditors would receive a small dividend, or perhaps nothing at all. Accordingly it has been decided that a shareholder in a limited liability company, who is also a creditor of the company to a larger amount than that remaining unpaid upon his shares, is not entitled to compensate the amount of the calls made on him by so much of his debt, and to receive a dividend on the balance; nor is he entitled to have the dividend calculated upon the entire debt, and to be paid the balance of dividend after deducting the amount of

the calls; but he must first pay the call, and he will then be entitled to a dividend *pari passu* with the other creditors who are not shareholders. See the judgment of the Lord Chancellor *in re Overend, Gurney, &c., Co.* (Limited), *ex parte* Grissel, Aug. 1866, 36 Law Jour. Ch. 752.

It may here be noticed that, according to the English authorities, and in all likelihood in conformity with the law of Scotland also, the right of a debtor to compensation will not be affected by the mere fact, that at the time when it becomes competent, the affairs of the creditor, though a limited company, are in course of being wound up. In *The Agra and Masterman's Bank* (Limited) *ex parte* Anderson, Nov. 15, 1866, 36 Law Jour. Ch. 73, Wood., V. C., said "The rights of set-off being once established, I apprehend that it will not be interfered with by anything that has taken place under the winding up. The matter must have been under the consideration of the Legislature at the time of the passing of the Winding-up Acts, and we find that it has made no provision analogous to those of the Bankruptcy Acts; it seems to have recognised the fact that a set-off should be allowed to a greater extent than where assets are under administration in Bankruptcy. There being then no express enactment which alters, as in favour of or against an insolvent company, the rights, as they ordinarily exist between debtor and creditor, I must regard the case exactly as if no winding-up order had been made, and as if the parties had been in the position of ordinary debtor and creditor."

Trustees liable to be made contributories.—In all registered companies, even such as are unlimited, the public deal with the concern not so much on the faith of any property which it may directly hold, as on the credit of the persons whose names appear on the register of shareholders. When the company is limited, it is still more important that the public shall have direct means of ascertaining whether the members are really capable of paying the amount of their shares, or the sum for which they are respectively guarantees. It therefore becomes almost a necessary condition of the fair working of such associations that the individuals whose names appear on the register shall be directly responsible, and that nothing in the nature of a trust shall be allowed to intervene between them and the public creditor. The legislature has accordingly wisely provided that no notice of any trust shall be entered on the register in English or Irish com-

panies formed under the Act of 1862. Apart from the advantage thus secured to those dealing with such associations, this prohibition is of manifest importance to the members themselves, who, whether their liability be limited or unlimited, have an obvious interest in ascertaining the means of those with whom they are associated. It is also of great importance in a winding-up; for if in such a process, complicated enough as it almost always is, questions of trust were to be allowed to be raised in settling the list of contributories, hopeless confusion, delay, and expense would often be the result. The English Courts have accordingly carried out this provision in its true spirit, and have steadfastly refused to allow any questions of this kind to be entertained in a winding-up, See *Cragg* v. *Taylor*, Jan. 1866, 35 Law Jour. (Ex.) 92; *Imperial Credit Association*, 1867. 2 Law Rep. (Eq.) 361; *East of England Banking Co. Ex parte* Bogg, May 11, 1866, 35 Law Jour. Ch., 43. One of the greatest evils under which Scotland labours, in consequence of her peculiar legal system, is that she is thereby kept aloof from the stream of imperial legislation, so that numerous enactments of the most salutary kind are declared not to be applicable north of the Tweed. From the date of the Union downwards anomalies of this kind encumber the statute book, and every new session of Parliament appears to add to their number. One of the most remarkable examples of this perversity of legislation is furnished by the Act of 1862, which, in section 30, appears by implication to deny to Scotland the benefit of the salutary provision which we have just been considering. It is important, however, to notice that though the Registrar is not prohibited, as in England and Ireland, from entering a notice of trusts, it remains to be seen whether the Courts will recognise them; and whether, in the interests of the public, they will not deal with the trustee as the true owner of the shares, and liable to be made a contributory in his individual capacity accordingly. When, indeed, it is remembered how apt trustees are, even when actuated by the best of motives, to embark the means of their beneficiaries in trading speculations, the danger becomes very apparent of sanctioning a practice whereby persons may be made contributories in a concern in whose management they can take no share, and as to immingling themselves with which they were never consulted. See on this subject the late case of *Lumsden* v. *Peddie*, Nov. 16, 1866, 5 M'Ph., 38, and in particular the lucid statement of the law by the Lord Justice-Clerk (Inglis), who delivered the judgment of the Court.

Effects of a Winding-up Order.—It may be stated as a general principle in the law applicable to the winding up of companies, that the rights, duties, and liabilities, of all concerned, are not altered or affected in any respect, except in so far as provided by the legislature, or plainly necessary for the purposes of the winding up order. In this respect a winding up very much resembles the Scotch mercantile sequestration—the object of both being to realize and divide the estate among creditors as effectively, expeditiously, and cheaply, as possible, but with as much regard to the rights of all concerned as is compatible with attaining these ends. Hence the liquidator, like the trustee, cannot incur new obligations, nor carry on the business of the concern except as required for the purposes of winding up, but in other matters he must generally leave the rights of all concerned undisturbed, giving them full effect, as if the concern were still pursuing its ordinary course. Some cases illustrative of these remarks may here be noticed. It is the inalienable right of all shareholders, as of all partners, to obtain access to, and inspect the company books at all convenient times; and no private stipulations or agreements, though they may regulate, will be read as defeating the exercise of this right. (See *Clark on Partnership*, p. 387). The fact that the company is being wound up does not in any degree derogate from this right. Accordingly, where, as *in re The Birmingham Banking Company, ex parte* Brinsley, an application was made by a contributory for leave to inspect the books of the company, which was being wound up by the court, and when, as *in re The Joint-Stock Discount Company, ex parte* Buchan, an application was made by several shareholders for leave to inspect the books and papers of the company, which was in the same position, and to take extracts therefrom, and for that purpose to employ an accountant, the applications were granted—the Court holding that the books and papers of a company are the property of the shareholders, and that they are entitled to inspect them, though there should be a secrecy clause in the articles of association, and though in the course of inspection they may become acquainted with matters which ought to be kept secret; but that it is their duty not to divulge the information so acquired, and that the Court will restrain them from so doing, and will punish them if they so offend. Nov. 14 & 17, 1866, 36 Law Jour. Ch. 150. It is in accordance with the same principle that the equitable right of set-off is not, as we have already

seen, disturbed by the supervention of a winding-up order. In like manner it has been held in England that a petition to wind up does not constitute a *lis pendens* against a contributory—that is to say, does not render his property litigious—and accordingly, when the official liquidator had registered the winding-up as a *lis pendens* against a contributory, the Court ordered him to vacate the registration. *In re Barned's Banking Company* (Limited) Jan. 14, 1867, 36 Law Jour. Ch. 190. On the other hand, the shareholders are not entitled to do anything which would embarrass or throw unnecessary obstacles in the way of realizing the company assets, for that is one of the main purposes of winding up. Hence it has been decided that persons on the list of shareholders of a company in course of being wound up have thereby incurred a *prima facie* legal liability, and are not entitled to resist the making of a call on the ground that they assert a right to have their names removed from the list; but that their remedy is to apply for suspension of the operation of the call as against themselves. *In re Barned's Banking Company* (Limited), Jan. 24, 1867, 36 Law Jour. Ch. 215. As the main object of any winding-up is to provide for the interests of such as have dealings with the company, the Courts have been careful to see that nothing takes place whereby those interests might be defeated or injured. The following may be noticed as a practical instance of the application of this principle. By sec. 153 of the Companies' Act of 1862, it is enacted that every transfer of shares, made between the commencement of the winding up and the order for winding up, shall be void, unless the Court otherwise orders. Yet in *Chapman* v. *Shepherd*, Jan. 12, 1867, 36 Law Jour. (Q. B.) 113, where A. employed B. as broker to buy shares in a joint-stock company, according to the rules of the Stock Exchange, for a certain account day, and B., in accordance with such rules, paid for and took a transfer of the shares on that day; the Court held that A. was bound to repay B. the amount so paid, although, before such account day, the company was being wound up within the meaning of the Act. In like manner, where a company, which were in course of being wound up, were plaintiffs in a suit, and the defendant moved, under sec. 69 of the Act, that the plaintiffs should find security for costs, the Court held that such security must be substantial, suited to the circumstances of the case, and directed an inquiry at Chambers to determine the proper amount. *The Imperial*

Bank of China v. *the Imperial Bank of Hindustan*, June 12, 1865, 34 Law Jour. Ch. 678. At the same time the Court will not strain the provisions of the Act, when they are of a penal nature, so as to give greater relief against the estates of malfeasant officials than the legislature plainly intended. Thus it was held that the provisions of sec. 165 applied only to directors or officials in life, and not to their executors or representatives. *East of England Bank*, Dec. 1865, 35 Law Jour. Ch. 196.

Before leaving this branch of the subject, occasion may be taken to advert to the judgment of the House of Lords in the well known case of *The Western Bank* v. *Addie*, which was given on the 20th May 1867. The case contained many specialties; but in so far as the present subject is concerned its legal import is clear and unambiguous; it cannot be said to have introduced any new principle, but is of great value as bringing prominently into view some important principles of old standing in English law, which in recent cases appear to have been somewhat overlooked. These principles may be briefly stated as follows:—When a person has been induced by fraudulent misrepresentations on the part of directors or other such special officials to purchase shares in a company, and is thereby subjected to loss or damage, he may betake himself to one of two remedies. 1. He may obtain a rescission of the contract. 2. He may claim damages against the wrong-doers. Those two remedies must however be distinguished from each other in respect of their grounds, the parties against whom they are to be directed, and the circumstances in which they are competent. As to the first, viz., Rescission of the contract. An action for this purpose will lie against the company when it can be shown that the fraudulent misrepresentations were the principal, though not perhaps the only inducing cause of the purchase,—when the purchase is so recent that matters can still be restored to the same situation, and when the pursuer has not barred himself by acquiescence or homologation. When, however, restoration of matters to their former state has become impossible, as *e.g.*, by the company having been brought to an end, or being in course of being wound up, or where the injured party has plainly acquiesced in what has taken place, the remedy by rescission of the contract is excluded, and with it all recourse against the company. The second remedy is, however, still open, viz., an action of damages against the wrong-doers. This remedy is not however competent against the com-

pany, unless it can be shown that the shareholders had specially instructed the directors to make the representations complained of, or had afterwards taken the benefit of them, while in the knowledge that they were false and fraudulent. For, as a company acts entirely through its agents, deceit is not to be presumed against it. The action, therefore, lies in general against the directors only. To maintain it against them, the pursuer must show that their misrepresentations were really the inducing cause of his purchase, and that they were false and fraudulent; but if this can be established, it is no objection to the relevancy of the action, that the company is *de facto* at an end, that the shares no longer exist, or that from some other cause restitution against the company has become impossible.

By the 142nd and 143rd sections of the Act of 1862, it is provided, in relation to a voluntary winding up, that as soon as the affairs of the company are fully wound up, the liquidators shall call a general meeting, and shall lay before it an account shewing how the winding up has been conducted; that a return shall then be made to the registrar of the meeting having been held, &c.; and that after the elapse of three months from the registration of such return the company shall be deemed to be dissolved. It is obvious that if this provision as to dissolution were to be rigorously interpreted cases might occur where the winding up having been brought to an end, and the company dissolved before the rights and claims of parties had been properly adjusted, serious injustice might take place. It would appear, however, that when a case of this kind can be made out, the Courts will not hold themselves foreclosed from interfering to correct errors in the winding up, merely because the three months after which the company shall be deemed to be dissolved may have elapsed. Thus *in re The Crookhaven Company (Limited)*, Nov. 3, 1866, 36 Law. Jour. 226, a petition had been presented in the interval of the three months between the registration of the return of the general meeting and the dissolution of the company, praying that it might be declared that the petitioner and the other holders of paid-up shares in the company were entitled to be repaid the difference between the amount paid up by the holders of ordinary shares, and the full amount of the paid-up shares, and to have a call made upon the holders of ordinary shares sufficient for that purpose. Before the case came on for hearing the three months had elapsed for some considerable time,

and the statutory dissolution had accordingly taken place. Nevertheless the Court held that the jurisdiction had attached, and was not ousted by the subsequent dissolution of the company, and directed a call to be made in accordance with the prayer of the petition. And the Master of the Rolls took occasion to observe that "he was inclined to think, though it was not necessary for him to decide the question, that the dissolution of the company under the sections before referred to would not deprive the Court of its power to correct errors in the winding up."

A recent Scotch case may here be noticed as illustrative of the principles now under consideration. In *Jamieson* v. *Andrew*, March 20, 1866, 4 Macph. 617, the Garpel Hœmatite Company (Limited) was ordered to be wound up under the Act of 1862; Jamieson was appointed official liquidator. On examining the company premises, he discovered that all the books of importance, and particularly the register, which by statute is required to be kept at the registered office of the company, and also the transfer of shares had been abstracted. A diligence having been obtained, it was found that Mr Andrew, solicitor, London, had these documents in his possession, together with several other articles of importance belonging to the company. With the exception of the company's seal, he refused to deliver any of these, on the ground that he had a hold over them for certain outstanding debts due by the company. After considering very full and able written pleadings, the Court held that a company formed under the Act of 1862, and having its registered office in Scotland, could not remove the register of shareholders beyond Scotland; that such a company could not impignorate the register, which was a public document necessary for the due working of the corporation; that the transfers of shares were in the same or a similar position, and could not be impignorated; and that therefore Mr Andrew could not retain either the register or the transfers from the official liquidator. This decision is of great value, as it is one of the few Scotch cases in which the theory of a winding up under the Act of 1862, and the theory of corporation law applicable to companies formed under that Act, are clearly brought out. It gives effect to two very important principles, which ought to be steadily kept in view in all cases of this kind. The first is that while the liquidator is not unnecessarily to interfere with or invert the existing rights of parties, he must be deemed to be in possession of all rights and powers plainly re-

quired for the purposes of winding up. Without possession of the register and the transfer, it is obvious that no progress could be made in a winding up; because it would be impossible to ascertain who were *de facto* shareholders, and upon whom calls could validly be made. Upon this ground therefore alone the judgment might have been rested. But beyond this there is another principle of equal importance upon which the judgment might have been vindicated, and which would have held good even if no winding up were in progress, and if while the company was carrying on business in the ordinary way, some of the shareholders or even of the public transacting with the concern had insisted that the documents in question should be restored. Corporations are mere creatures of public authority, established for certain purposes—they can therefore possess no rights and can exercise no powers by which such purposes would be defeated. The register is no doubt the property of the corporation; but it is held for certain very specific purposes—one of the most important of which is that it shall be accessible and patent to the public not less than the shareholders, so as to secure that publicity which is essential to the safe and proper working of corporations of this kind. Hence the Act provides in the most anxious manner that the register shall be retained at the head office of the concern. The transfers again are equally necessary for the proper management of the concern. They are the materials for registration, and though the property of the individual shareholders, they must necessarily remain in the company's possession. Hence, as the possession both of the register and the transfers is plainly necessary for carrying on the corporation in accordance with the views of the statute by which it was brought into existence, it cannot legally impledge either of them, or deal with them in such a way as to defeat the conditions in respect of which it was incorporated. In this matter a corporation stands in a totally different position from an unincorporated partnership or company. The latter may like individuals do what they will with their own; the former, even in using its own property, cannot act in violation of the conditions in virtue of which it obtained its privileges. See *Clark on Partnership*, p. 787.

(To be Continued.)

INFANTICIDE.—II.

In our November number we endeavoured to trace one of the causes of the prevalence of infanticide. That we found to consist in a defect of administration, whereby, by concentrating the minds of the Jury upon one portion of the evidence, to the effect of losing sight of the general import of the whole, a one-sided, and therefore inadequate result is for the most part obtained. We are satisfied that there is more in this difficulty than people would at first be disposed to admit. There is not the slightest doubt that to establish a case of child-murder as the law now stands is very nearly an impossibility, and that a knowledge of that fact prevails not only among the educated classes, but in the lower orders of the community. It may be true, as some theorists maintain, that the fear of detection is not an element which enters to any appreciable extent into the perpetration of crime generally. But no one who is familiar with the practice of our Courts of Law but must be aware that child-murder forms at least an exception to this rule. It may sometimes be committed under the influence of shame, and when that feeling is in full force it is sufficient to over-ride all considerations; but it is more frequently, our experience shows, the result of a calculation of the chances and probabilities of getting rid of the incumbrance with impunity. If this remark is not well founded how otherwise can it be explained that the crime is seen to be committed by the same individual oftener than once?

We have said we do not object to the canon of the law that the Jury should be satisfied before conviction of the complete separation between the child and the mother. We say so for two reasons, because, according to any logical theory of law, it is difficult to see how that rule can be avoided, and, secondly, because we see no difficulty, if the rule is reasonably interpreted, of its leading to satisfactory results. There always, however, remains the question, What is reasonable interpretation? If, by the rule, is meant that although the Jury should be satisfied that injuries have been wilfully inflicted during the progress of birth, and that artificial and not natural violence is the cause of death, they are, notwithstanding, to proceed to an acquittal, because the violence was done upon an object which had the possibility of a legal existence, but had not actually acquired one, we have no difficulty whatever in rejecting it as utterly opposed to reason and common sense. But we should be sorry to think that any jurist of the present day, whatever may have been the tendencies of an earlier period, would insist on such a forced and rigorous construction. If the jury believe that, but for the injuries wilfully inflicted during birth, the child would have been born alive, which of course excludes the notion of any accidental failure to perform

the final act of separation, we say the rule has been to all intents and purposes satisfied, and there is no obstacle in the way of conviction. We are quite aware of the analogy that may be deduced in favour of the extreme view from the theory of the law in cases of abortion. In the punishment of that crime there is no regard whatever of the object for the removal or destruction of which the crime is committed. Beyond the general view that an offence has been committed against society, the law does not and cannot possibly inquire. But who will say that except in the presence in both of a legal fiction of the most imperceptible order, there is any real resemblance between the case of destroying the conditions under which a child may be produced, and the destruction of the child itself, when the whole period of gestation having past, it can no longer be retained as a complex body, and nature is engaged in its expulsion? Let the difficulties be esteemed as great as they can be stated in distinguishing the symptoms of natural and artificial violence—it is the boast of science that she will ultimately overcome far greater difficulties than these can be imagined—but do not raise barriers which it is impossible for truth or reason or any human faculty to overstep. But the law is not always so considerate of legal theories as some would wish to see it in its treatment of crime. What is the test of life—and it has been illustrated in many great succession causes—when the question is title to property? That the child has been heard to cry—which it notoriously can do as soon as the smallest portion of it comes into the world. We do not object to the protection of life and liberty by the strictest possible rules, so long as these are reasonable. But it is not reasonable that in civil matters the law should recognise a child that has been heard to cry as a legal person, and in matters criminal should look upon it as a mere physical object to be made with impunity the victim of every savage and lawless passion. It is quite true that the theory of the law, when the question of life is raised in a civil process only, is that from the fact of even a single cry, there is a *presumption* that the child has been fully born alive. But why should not the same presumption obtain in a criminal suit, instead of being treated, as it too often is, as a thing to be laughed to scorn? We know that now-a-days medical jurists can be got to say, not from mercenary aims, but out of the rivalries of their profession, almost anything under the sun. But we are greatly mistaken if the unprejudiced opinion of those who are the most competent to express it—and they are not always to be found in the witness box—is not that, in deducing the presumption that the civil law does from the cries of the child, it is proceeding on fair and reasonable grounds.[r]

But it is time to consider whether there are not other reasons of a less metaphysical kind that have something to do with the growing prevalence of infanticide. Our fundamental position—dealing with the question as a legal one—is that it is very much increased by the difficulties in the way of conviction. One of these we have endea-

voured to illustrate at some length; another we believe to be the frequent, almost invariable combination in the same libel of child-murder and the statutory crime of concealment of pregnancy. How often is it seen, even in cases of an aggravated description, that the Jury return into Court with a verdict of guilty on the minor charge? What is the reason of this—setting aside for the moment the difficulties of establishing the greater crime—but the facility with which the Jury, out of merciful considerations which counsel never fail to urge upon them, jump to the lower verdict to which it almost seems they are invited by the libel itself. And there is no reason in the combination. It is often expedient and even necessary to include several crimes in one indictment, such as murder and assault, or robbery and theft, or mobbing and rioting and breach of the peace, because it is often difficult to say where the one stops or passes into the other; and it would be unwise, and in the last degree rash, to peril a case on the adoption by a Jury of the view taken by the authorities who initiate the proceedings. Many a prisoner has escaped who has been clearly proved guilty of a crime known to the law on account of its not being set forth in the libel, which might easily have been done as an alternative charge; and accordingly it is now esteemed the safe, and it is the universal, practice in criminal pleading to frame the libel as comprehensively as possible. But there is no danger of a Jury confounding concealment of pregnancy with child-murder, and *vice versa*. Two conditions determine the former crime. (1.) That the child has been found dead. (2.) That no disclosure of pregnancy has been made before birth. Whether a child has been born dead or alive, is a fact for which, fortunately, there is an unfailing test. In the case of its being found dead without any suggestion that it has ever lived, no other charge of course is to be looked for even from the most zealous prosecutor than one of concealment of pregnancy. If it is clear that the child has been born alive, and, although found dead, there are no marks of violence, it is equally clear that in the present state of the law, and according to existing appliances for detection, it would be highly reprehensible to indict for anything beyond the minor charge. The only case in which there is any justification for putting the two crimes together is when artificial violence can reasonably be expected to be proved to be the cause of death, and there are at the same time facts from which, on the failure of the graver charge, the minor may be inferred. But even in these circumstances we think the combination is objectionable. If the Crown evidence is strong in the direction of guilt, it is unjust to the law to give the jury an opportunity, which they seldom fail to use, of getting rid of an unpleasant duty. If the evidence is of an opposite tendency it is quite hopeless in presence of known difficulties to look for a conviction of child-murder, and no prosecutor should libel beyond what he can reasonably expect to establish; and if the evidence on the graver charge be doubtful, while there is a possibility of its proving satis-

factory to the jury, nothing could be better conceived to prevent its being realized than the aggregation of the libel. It will be observed that in dealing with this class of cases the public prosecutor cannot experience the difficulty of a resemblance between the two crimes; for the conditions that determine both are manifest and decided, and however much juries may avail themselves of the pretext with which they are too often furnished, it is quite easy to say either before or after their verdict has been returned what crime has been committed. We omit, in this objection to the combination, any reference to the fact that a statutory crime is put beside a crime at common law. Whether in any circumstances this should be permitted, as a practice inconsistent with strict legal pleading, is a position which, in our opinion, may be very gravely argued. But there is no occasion for us to enter on that question now, believing as we do that the creation of statutory crimes is altogether indefensible and unnecessary. We do not see that they serve any purpose but to keep the door open for the escape of the guilty. The theory of the common law is elastic enough to adapt itself to any circumstances that may arise, and it is sound law and sound policy that the common law, instead of being hedged round by limitations, should be made as elastic as possible. The operation of the game laws is ample evidence of the truth of these remarks. Conceived and framed in a spirit of mere formalism, and amid the apprehension of mere subtleties, their only effect is to create legal controversies, and, as a necessary consequence, to defeat justice. But if concealment of pregnancy were libelled as a charge at common law we can see no reason why, in more than one out of ten cases, to take a very moderate average, it should be libelled in connection with child-murder rather than with any other crime.

A very important question still remains for consideration. How far, if at all, is the increase of infanticide explainable by the rigour of the punishment with which, upon conviction, it is now visited? The prevailing notion is that the punishment is too severe. But with this feeling, which we assume for the moment to be based on a legal apprehension of the nature of the crime, and of its just recompense, there is mixed up another feeling, or rather sentiment, the operation of which we cannot admit to be legitimate within the sphere of law. It may be that the later sentences of the Court for this crime have been unduly harsh, and in some cases even oppressive. That is a question which we shall have occasion immediately to consider. But it is perfectly idle to say—and whoever submits the argument unmistakeably testifies his incapacity to deal with the subject—that the law, in awarding punishment, is to take into account the moral guilt of a seducer as a mitigating circumstance in favour of the party who perpetrates the crime. Let the law if it chooses make seduction a criminal offence; we fear the objection to that suggestion would be found insuperable, that it is impossible by Acts of Parliament or criminal prosecutions to make the people moral. Or let that aspect

of the question be considered the moral one, and let the public deal with it according to strict or lenient rules as it judges proper. But we can imagine no case in which the intermixture of law and morals, administered on the footing of mere personal discretion, may prove more pernicious than in that of infanticide. Everything, according to this theory, depends on the temperament of the judge. One man of susceptible feelings will dismiss a panel from the bar with little more than an admonition, looking upon her as a martyr, almost worthy of reward. Another, conscious of self-control, and master of his emotions, will revolt at a surrender with which he cannot sympathize, and possessed by one idea, will pronounce a sentence utterly disproportionate to the circumstances of the crime. Unless a fixed standard of punishment—let the induction on which it is based be as wide as possible—is laid down it is hopeless to look to punishment as a deterrent influence at all. This, of course, does not involve a disregard of circumstances—there is no crime in the punishment of which such disregard would not ultimately lead to a complete frustration of the ends of justice; but it involves a principle in the truth of which there is now almost a universal concurrence of opinion, that certainty of punishment, certainty not only that there will be punishment, but also a certain amount of it, is a powerful agent in the repression of crime.

We are quite aware that excessive punishment is fitted to operate its own discomfiture. We have only to go back to the state of our own law some thirty or forty years ago for evidence of this. Sheep-stealing was a capital offence, and what was the result? That the crime was spread broadcast over the length and breadth of the country, and that it was committed with impunity. There was no indifference to the value of property, nor any failure to recognise the wickedness and extent of the crime, but people felt that it was better to lose a sheep than to be the cause of an execution. To abate the rigour of the law was a matter of obvious necessity, only exciting the surprise that a system of law in other respects enlightened should have so long cumbered itself with the relics of a barbarous age. And what has been the effect of the abatement is sufficiently evident from the comparative rarity of the crime. It may be right incidentally to notice that there is one crime, viz., forgery, which stands upon a footing exceptional to this rule. The punishment of forgery, like sheep-stealing, was also at one time capital; it is now the subject of arbitrary punishment. But the results have not been equally harmonious. While sheep-stealing has decreased, the statistics of forgery have gone the other way. The cause of this, however, is not to be found in any theories or principles of punishment; it is a natural result of the commercial activities of the age, which will exist so long as these are guided by speculation rather than by capital, and the only permanent remedy which is possible for it must come out of an improvement in the mercantile honesty of the nation. Forgery, however, is strictly an exception to the general rule that excessive punishments defeat their own ends.

But although holding these general views we cannot concur in the opinion that the present punishment of infanticide is too severe. No statement of the crime and of the circumstances in which it may be committed can detract from the fact that it is the wickedly taking away of human life. We have heard the argument more than once repeated that there are many considerations of social expediency which render the prevalence of child-murder, in an overgrown community like our own, to some extent desirable. It is said, on the one hand, that excessive population must be avoided, and on the other, that the injury being committed at a period it may be said of unconsciousness, there is no cruelty in the act itself, which may indeed prove a merciful deliverance from untold evils. To such arguments we do not profess to be able to adduce a better answer than the divine injunction of the sixth commandment.

We do not fail to distinguish the difference in magnitude between the sacrifice of infant and of adult life. But this is only in other words to say that the sin of cupidity, or unbridled passion, or deliberate revenge, is more heinous than the criminal impulses under which the crime of child-murder is frequently committed. The distinction, so far as it is established by facts, is a very proper one for the law to regard in awarding punishment. But we think a great mistake is made if the law does not start with the recognition of death as the basis of the common punishment in both crimes. Logically, and having regard to principle, they must be assimilated. The law can have no security if it proceeds from any other point of view than that both merit its extreme penalty, and that a special case must be set up if in either that does not receive effect. It is easy to conceive a case of child-murder so aggravated in its circumstances as to demand capital punishment as much as the most cold-blooded murder that ever made a gallows. It is as easy to conceive a case in which such an amount of punishment would be a greater wrong than the crime itself, and it would be difficult to say that the crime of murder, properly so called, admits of so palpable a distinction. But it is matter of every-day experience that there is no crime which discloses such variety of circumstances as that of child-murder; and accordingly between the limits we have pointed out there is scope for the operation to any extent of those mitigating circumstances which it is right that the law should recognise. Our objection, therefore, to the punishment of child-murder is based not so much upon a consideration of individual cases as of the principle upon which it is administered. The true principle we hold to be that every case of murder should be punished by death, unless a very clear cause is shown to the contrary. The principle in practice is the very opposite, for everything is done by everybody concerned to avoid the award of a capital sentence even in the knowledge that that is a mere tribute to form, and will not be carried into execution. It may be said—and we have no want of sympathy with the observation—that to sentence a panel to death in the full consciousness

that the sentence will not receive effect, is a solemn mockery which is worse than useless. We only advert to the dread with which a verdict of murder is anticipated in any serious case of infanticide, for the purpose of showing that there is a want of harmony between the law and its administration which stands imperatively in need of amendment. It may be that child-murder should in no case be followed by a capital sentence—if that result commend itself let it be sanctioned by legislative enactment, or at least by the same amount of assurance that a person who has committed robbery feels that he will not be hanged. The present uncertain attitude of the law has the double effect of hampering a prisoner in his defence, and of presenting the administration of justice in anything but a dignified or impressive aspect.

For ourselves we must say we see no reason in the world why a woman who has deliberately taken away the life of her child in order o escape the burden which she is apprehensive it may prove to her, hould not be hanged just as much as the highway robber who commits murder to enrich himself with his victim's spoils. Cupidity in different forms is the basis of both crimes, and we are not aware of any principle sanctioning an estimate of the value of life by mere considerations of age. If there had not been a miscarriage of justice on mere technical grounds, is there any doubt that Charlotte Mason would have died upon the scaffold, and that the public voice would unanimously have approved the result. Is it not an *a fortiori* case that a mother who has the instincts of preservation which a stranger does not feel, should be visited with as much punishment when the crime is committed with the same deliberation. We confess we should like to see the experiment of sending a few heartless worldly-minded young mothers to the scaffold. Many will esteem that a hard, perhaps an un-Christian sentiment—our opinion is that the sentiment lies all the other way. For we have no belief whatever in the unconsciousness theory of self-delivery which Taylor and other judicial experts have done so much to foster with the most pernicious results to the well-being and the morals of the people. That it contains an element of truth, and that in some cases that wears a very decided aspect, it would be absurd to deny; but it would be equally absurd to deny that the proper evidence is to be sought in the facts and in the history of the case, and not in the stimulated imaginations of medical theorists. Practically, however, the law proceeds, and is administered upon a recognition of the theory to an extent that is simply ludicrous; for the mere suggestion of it will transform a sentence of penal servitude, conceived in a just apprehension of the law and of the crime which is a breach of the law into a short punishment by imprisonment. It is not an uncommon, it is in truth a usual thing, that the plea receives effect in circumstances such as these, that the mother had made no disclosure of her pregnancy, nor any preparation for the birth, that the body of the child is discovered with wounds indicating an intention to kill, that after apprehension

the mother denies the birth, but afterwards admits it when she feels that the web is being closely woven round her. Undoubtedly to these circumstances the plea may be perfectly applicable. But is the applicability to depend upon a mere medical theory that in such circumstances the crime of child-murder has been committed, but without responsibility? In other words, is it reasonable to suppose that there is an absence of reason in acts which *ex facie* involve a reasoning, although a wicked cause? Give by all means to a well-established medical fact its true significance—it is a very high boast and very fair evidence of a well-ordered system of law that it gives effect to conclusions which are scientifically sound. But medical tests are not more than instruments in the detection of truth, and like all other methods for arriving at truth they are worse than worthless if they are not guided by the dictates of reason and of common sense, and reject the assistance of general knowledge.

To sum up; the following propositions are involved in our remarks. 1. Evidence in cases of infanticide is not presented to the jury under the same conditions in which they are called upon to weigh evidence in other matters. The medical is separated from the general testimony instead of the whole evidence being taken as a whole, the effect of which is to determine conviction or acquittal by the theories of experts. It is true that such witnesses are called to speak not to facts but to opinions, but the verdict of the jury should be the result of a consideration of the whole evidence; and after a case has been sent to a jury the only admissible distinction between different parts of the evidence is its greater or less sufficiency. 2. It is inexpedient, even where there is evidence to establish that both the crimes of child-murder and of concealment of pregnancy have been incurred, that they should be combined in the same libel, because the practical effect of that is an invitation to the jury to return a verdict on the minor charge. And there is no necessity for the combination. The distinction between the two crimes is significantly marked, and there is no danger of the one being mistaken for the other. 3. Infanticide, as the wilful taking away of life, should in aggravated cases, or in other words where there is evidence of a deliberate purpose to kill, and no proof of those impulses which the law regards as extenuating circumstances of this crime, be followed by capital punishment. 4. There should be a fixed standard of punishment applicable on the average, and having due regard to mitigating circumstances where these are rested on legal grounds, to those cases in which punishment by death is deemed excessive.

Correspondence.

GLASGOW SHERIFFS.

(To the Editor of the Journal of Jurisprudence.)

SIR,—It will be conferring a public service if some of your readers will inform me, through your pages, whether it is the fact that a gentleman holding the office of Sheriff-Substitute in Glasgow, is also Inspector of Common Lodging Houses for that city, with a salary of £200 a-year? It appears scarcely consistent with the dignity or with the duties of the judicial office, that one of its occupants should be the official visitor of the brothels of Glassford Street and the cellars of the Saltmarket,—I am, Sir, &c.,

AN ANXIOUS INQUIRER.

The Month.

The Late Sir Archibald Alison.—The celebrated Sheriff of Lanarkshire died at the age of 74, on Thursday the 23d May, about half an hour before the close of that day, of an affection of the lungs, the dangerous if not deadly nature of which had been apparent for more than a week. He was the younger son of the Rev. Archibald Alison, who had been educated at Glasgow and at Baliol College, Oxford, and he was born in the parsonage house of Henley, in Shropshire, in the year 1792. His mother was the youngest daughter of Professor John Gregory, of Edinburgh. About eight years after his birth his father left England to become minister of St Paul's Episcopal Chapel in Edinburgh, and in the first quarter of this century he held a high place in the literary society of Edinburgh as an elegant preacher, and the author of two volumes of Sermons and of an essay on "The Nature and Principles of Taste," which is little known now except from Jeffrey's late review of it, which is itself not much known. Sir Archibald and his elder brother were educated at Edinburgh University. The elder brother, by name William Pulteney, afterwards became Dr. Alison, and was much respected and even loved in Edinburgh as a man of much benevolence, ever ready to give the poor the benefit of his skill, and to give them his money freely when he thought that money was the thing which was most required. In his "Past and Present" Carlyle has written of him as "the brave and humane Dr. Alison, who speaks what he knows, whose noble healing art in his charitable hands becomes once more a truly sacred one,"—words which are likely to keep the family name above oblivion as long as any. Archibald passed as advocate in 1814, and then travelled it is said for eight years, probably because he had little or nothing to do in his profession. Through his father's

influence and his personal profession of the political faith of Toryism he was appointed an advocate-depute in 1823, and was lucky enough to remain in office with his party for seven years. During this period he had been under the necessity of studying the criminal law of Scotland, and in the next four years, having a good deal of leisure, he spent part of his time in the composition of his well-known treatise on "The Principles and Practice of the Criminal Law of Scotland." In 1834, the Tories being again in power, and the office of Sheriff of Lanarkshire having fallen vacant by the death of William Rose Robinson, he was appointed to the vacant office, and he has held it ever since. His History of Europe, from the commencement of the French Revolution in 1789 to the Restoration of the Bourbons in 1815, was completed in 1842, and a revised edition of it was published in 1860, as well as of a continuation bringing it down to the end of the Crimean War. In 1845 he was elected Lord Rector of Marischal College, Aberdeen, by the students. In 1850 Glasgow University students conferred the same honour on him. In 1852 Lord Derby's government created him a baronet, and would have appointed him a judge in the Court of Session if that could have been done without an outrageous disregard of decency. The late Lord Justice Clerk Hope is said to have stoutly opposed Sir Archibald's translation from Glasgow. Certainly he did not like Sir Archibald, but it is also certain that if he opposed the promotion of so distinguished a figure of his own party he did it on grounds satisfactory to, and probably imperative upon his conscience. Could Sir Archibald have seen into the realities of the proposal he would not have desired to be removed from the leisure, dignity, and virtual supremacy which he enjoyed in Glasgow, the commercial metropolis of the kingdom, to the chair of Junior Lord Ordinary with its irksome details, inevitable work, and ill-natured critics.

. The life of Sir Archibald Alison was full, wonderfully full of honours. Whether he deserved them all, and if not how he attained them, are questions not to be settled at this time, and not likely to be of much interest a hundred or even fifty years hence. In Glasgow there are many who believe, or at least who profess to believe, that his merits have not been adequately rewarded; in Edinburgh there are few who would hesitate to announce a contrary opinion. Probably the truth is between the extreme opinions—that is to say, he was not such a genius as he is reckoned in Lanarkshire, not so much of the reverse as he is reckoned in the critical metropolis. So far as we can judge, his mind was essentially and entirely commonplace, except in power of application. The work he did, especially the literary work, in point of *quantity* attests a very rare industrial faculty, which in itself is worthy of not a little admiration and praise. Not one man in ten thousand could have gone through the toil of writing so many volumes; but probably not one man in a million would have thought the work worth doing after he understood it, and would not have been smitten with such a disbelief in it as would

have rendered the labour more odious than the tread-mill. Perhaps the secret of Alison's going through it was that he never took time to understand it. He is ever pushing along in breathless haste, with pulse dancing, face flushed, eye dazzled and hot and dim, caring little where he is travelling, provided he maintain his pace and can keep up the belief that he is in rapid motion through space and time, and the dust and shadows of both, under the guidance of that Providence which is always unrolling itself in favour of the Tories. Does he describe the battle of Waterloo? He gives the dust, smoke, hurry, and confusion, but does he give a clear or rational idea of any thing? Does he describe a battle that an artillerist, or a natural philosopher, who knows the laws of projectiles, or a general can understand? Does he not tell a great deal which they all know *cannot* possibly be true? In short, is there any branch of human knowledge of which he writes, and he writes of many, of which he does not shew his superficial knowledge and his profound ignorance? His similes nearly all betray inaccurate information and thought. He blunders in geography, and his criticisms of modern English literature are unrivalled in absurdity. Of his work on Criminal Law, on which we are best entitled to pronounce an opinion in these pages, we do not hesitate to declare that though it be the work that he bestowed most study upon, and is probably the most accurate of all his works, there is not a respectable work in Scottish legal literature which is so inaccurate. No junior counsel ever read much at it who was not misled by it. Out of Glasgow it could not be listened to as an authority, and although it has been already called "the standard authority" we feel assured that it never will be recognized as such. Still it is a highly readable, interesting treatise, useful for suggestions and references, but dangerous to rely upon for principles, or even for facts.

As a judge, Sir Archibald Alison was distinguished by the same marvellous powers of industry and of inaccuracy which he manifested as an author. He did more work than any four or five ordinary sheriffs, but he made more egregious blunders than all the sheriffs in Scotland put together. His interlocutors contained perversions of fact as glaring as any in the pages of his history, and more easy of detection, seeing that the evidence which afforded the means of detection was printed in the same paper. No man who has heard his judgments discussed and reviewed in the First and Second Divisions would believe any fact upon his statement of it. He did not intend to mis-state, but he did it with a success which an intentional perverter of fact could not have achieved. His mind was an uneven mirror, the reflections and distortions of which baffled, surprised, defied imagination. He always, however, got through his judicial work and cleared it off his hands in some way, and his faculty of having done with it, however erroneously, endeared him to many of the busy legal gentlemen of Glasgow so much, that their ideal of law reform never went beyond giving finality to his deci-

sions. He was always very polite and dignified in his bearing towards those who appeared to plead before him. The interlocutor when it appeared might be rather astonishing, but there were no rankling memories of judicial insolence during the debate. The truth is, Sir Archibald was by birth, education, and disposition, a *gentleman*, not quite perfect, perhaps, but tolerably perfect for a lawyer. He did not hurt the feelings of any one: he was kind and courteous to all. Indeed, some of his errors in law were pretty distinctly traceable to his goodness of heart. But for his personal amiability he would not have succeeded in life as he did, nor been idolized in Glasgow by those who saw most of him as he was. He was really faithful to Glasgow as Glasgow was to him, and this must be his excuse for discovering among Glasgow procurators so much heaven-born genius worthy to be raised to the Glasgow judicial bench as he did.

In person Sir Archibald was a handsome man, at least ladies thought so. He was tall, fair-haired, and blue-eyed. His features were cast in the mould of intellect, but we never could avoid the conviction that the mould was hereditary rather than individual. There was a deficiency of life and keenness about his expression. The features of men of high intellect seem in general to be formed of marble, or of bronze, but his seemed to be formed of the desert-sand.

We are sorry not to be able to write of him, now that he is gone beyond the reach of censure, in more kindly and eulogistic terms. But it is necessary in these days of complimentary obituary platitudes to speak the truth for the benefit of the living. Undue praise is of no consequence at this hour to Sir Archibald Alison, but the truth is of some consequence to all who aspire to positions and honours of which they are unworthy, and to those unjust persons who help them to reach the altitude of their aspirations. Of his character as a man we say nothing, except that he was liked and respected by those who knew him best. Had he filled a humbler sphere, and been less famous as a manufacturer of incumbrances for book-shelves, he would have escaped our censure, and would, we doubt not, have lived a more useful, and died a happier man.

Retirement of Mr Currie.—Alexander Currie, Esq., has resigned the office of Principal Clerk of Session which he has held since 1856. He was called to the Bar in 1820, and at one time enjoyed a large practice, his written pleadings under the former system being of great merit. He was appointed an Advocate Depute, and previous to his appointment as P.C.S. he had for some time been Sheriff of Banffshire. Mr Currie was more than a merely ornamental appendage to the Court, and the absence of his well-known figure at the table of the First Division will be felt and regretted by all.

The Toomer Case.—It is satisfactory that Mr Walpole should, before his resignation of office, have been compelled to do a tardy

and partial act of justice in remitting the remainder of the sentence passed on Neville Maskelyne Toomer for alleged rape on Miss Partridge. The reasons assigned are the nature of the evidence, the jury's recommendation to mercy, and the amount of punishment already endured. This evades the true objection which the press has been urging for months past, viz., that the conviction was wrong. The evidence showed that there was no rape, not merely that it was a rape of a mild and less heinous character. The redress should have been a free pardon.

"There is too great a tendency," says a contemporary, "alike with judges and juries to vicarious punishment. They think a defendant guilty of some offence which cannot be proved, and punish him for that under cover of a conviction for some other offence. There is none so open to this abuse as the crime with which Toomer was charged. Many a juryman, and we fear, also, some sentimental judges, do not very clearly observe the distinction between fornication and rape, between vice and crime, as we once heard the late Mr Justice Talfourd tell the jury that the rape of the mind was worse than the rape of the body. Many are yearly found guilty of rape who were really guilty only of fornication, because the average juryman says to himself, 'He went with her, and she swears she did not want him to—that's enough.' Every counsel experienced in criminal courts, knows how dangerous is the defence of consent, however strongly all the circumstances of the case, as they come out in cross-examination, showed that there was no real resistance. Toomer's trial, conviction, punishment, and pardon, affords another proof—if more were wanting—of the extreme care required in the sifting of evidence in charges of rape, of all others the easiest made, the most difficult to answer. Baron Platt once told the writer that his long experience at the criminal bar had taught him this—that he did not believe in rapes; they were possible, but improbable. We would not go quite so far as this; but where the liberty of a life depends upon the truthfulness of a single witness, usually under the strongest inducements to save her character by swearing it was against her will, the mere assertion that it was so should be treated as worthless, and the judgment should be formed by the conduct at and immediately after the time—whether there was proper resistance, if the earliest possible complaint was made, and if the conduct throughout was that of enraged virtue, and not of detected frailty."

Liability of Railway Companies for latent defects in their Carriages.—The decision of the Court of Queen's Bench in the late case of *Redhead* v. *North Midland Ry. Co.*, May 15, 1867, has, so far as it merely decides a question of law, received a factitious importance in the discussions of the newspaper press, as well as in the opinions of the judges. It determines that railway companies are not liable in damages to passengers injured by accidents arising from latent defects in the vehicles by which they are conveyed, but only for those which may be discovered and guarded against. The view contended for by the Railway Company, and adopted by one of the judges (Blackburn, J.), was, that the company, though not as carriers of passengers insurers, yet undertakes, in providing a suitable

vehicle, something more than due care and diligence, viz., a warranty that the carriage is sound and free from all flaws, even those which are not discoverable by any care or skill. We had imagined that the doctrine which recommended itself to the majority of the Court was long ago quite settled law, and subject to no manner of doubt. In Scotland at least it is so. Mr Bell says (Com. i. 462, ed. Shaw, 153), "This responsibility (of the carrier of passengers) is according to the rule of the contract for the sufficiency of the carriage and ordinary care (*culpa levis*) of those employed. As to the sufficiency of the carriage, it is enough if it be sufficient as far as the eye can discover." The same doctrine is laid down in the *Principles*, sec. 170. The cases referred to all show that till this moment it has never been seriously questioned in Scotland since 1820, that the carrier of passengers by land discharges all the onus that lies on him by proving that his vehicle was "trustworthy," as Professor Bell and Lush, J., express it, or "landworthy," in the language of Lord Ellenborough. In that year an exception was disallowed to a direction that coach proprietors were not liable in damages for the breaking of an axletree which "was defective and faulty, but sound as far as human foresight could reach."—*Anderson* v. *Pyper & Co.*, 2 Murr. 261; cf. *Lyon* v. *Lamb*, June 22, 1838, 16 S. 1188. In other words, the liability of the carrier is for negligence, but does not extend further. He does not take any risk beyond that. This doctrine was applied to Railway Companies in the adjustment of issues in *MacGlashan* v. *Dundee & Perth Ry. Co.*, June 23, 1848, 10 D. 1397, s.c. 1401; and also more distinctly in *Cargill* v. *Dundee & Perth Ry. Co.*, Dec. 7, 1848, 11 D. 216, and *Sneddon* v. *Addie*, June 16, 1849, 11 D. 1149. See J. G. Smith *on Reparation*, pp. 72, 410. Mr Justice Lush says that there is no English case reported in which the question has been argued and solemnly decided; but both he and Mellor, J., refer to numerous cases all pointing unmistakeably to the same result. It is remarkable that the first authority referred to in the passage above cited from Bell's *Commentaries* is the doctrine of Sir James Mansfield, C.J., in the English case of *Christie* v. *Griggs*, 2 Camp. 81: "If the axletree was sound as far as human eye could discover, the defendant was not liable." And we read in the last edition of Smith's *Mercantile Law*: "A stage coach owner ..... does not warrant the safety of the passengers, at all events; but only that so far as human care and foresight will go their safe conveyance will be provided for. Neither does a railway company which carries passengers." Regard being had to such authorities, which are numerous (for it is needless here to refer to Story on *Bailments*, and the cases cited in support of the judgment in *Redhead* v. *N. Midland Ry. Co.*), it is somewhat odd that the question should have been raised at all at this time of day, and still more so that a judge of high reputation should have differed from the majority. That newspaper writers should have regarded the judgment as a new and important light thrown upon the law is perhaps less sur-

prising; but we think that when they were dealing with the subject they should have discovered that it really involves a very important principle, not of law but of public policy, which (though they have carefully abstained from touching upon it), it was peculiarly within their province to discuss, and which was the true reason why Blackburn J. in the face of all the authorities differed from his brethren. For certain reasons of expediency the common law holds carriers as insurers of goods committed to their care, and as answerable for every loss or damage happening to them while in their custody, from whatever cause, unless it be by the act of God or the King's enemies. Mr Justice Blackburn does not seek to carry the liability for injuries to passengers quite so high as that;—

"But," he says, "if there is an obligation to provide a vehicle of sufficient strength, then the failure to do so—whether through his fault or not—is a breach of that duty. It is admitted that there is such a liability as to the carriage of goods; and it would be strange if there were a less stringent liability as to passengers, where it involves the safety of their lives and limbs. The passenger is obliged to trust entirely to the carrier as to the safety of the vehicle, and has no means of examining into it himself. It has been well settled that one who contracts to supply an article for a particular purpose warrants that it is fit for that purpose; and the principle is that, as he undertakes to select it, he is liable if it is unfit for the purpose for which he supplies it. The principle appears to me to be equally applicable to the case of a carrier who supplies a vehicle for the carriage of his passengers. Upon the same principle a shipowner is deemed to warrant that his ship is seaworthy, and this warranty is said to be "implied from the nature of the contract." I think it is equally implied from the nature of the contract between the carrier and his passenger; and the case is surely stronger as regards passengers than as regards goods, seeing that it concerns the personal safety of the passengers."

Lawyers will nearly all admit that on established principles no other decision was possible than that which was given in this case. But it must also be granted that much may be said, more than we have space to say at present, in favour of legislative interference to extend the responsibility of railway companies in this respect.

Appointments.—Sir George Home, Bart., Advocate, has been appointed Sheriff-Substitute of Argyleshire at Inverary, in place of Mr J. Cunningham Graham, resigned. Sir George Home was called to the Bar in 1855. His appointment is a satisfactory one, not only to those who have known him in the Parliament House, but also, we are informed, in the district over which he is to preside, where he has for some time officiated as interim Sheriff-Substitute.

H. M. Taylor, Esq., Procurator-Fiscal at Tain, has been appointed Sheriff-Substitute of Easter Ross in place of the late W. H. Murray, Esq. The *Inverness Courier* says that people in the district are satisfied with the appointment. It is however much to be regretted, on public grounds, that a Sheriff who deservedly enjoys so high a position and character as Mr A. S. Cook, should by such an appoint-

ment appear to adopt the views lately expressed in a high quarter as to the qualities required in a Sheriff-Substitute, views which are still more to be deprecated in their application to the procurators of remote Highland districts than to the numerous highly-trained agents of Glasgow. The lesson of experience both in England and Scotland is that the proper course, in ordinary circumstances, is to select men to preside in the local courts from those who have spent their youth and their means in qualifying themselves for the highest branch of the legal profession, rather than from those who have been accustomed to the narrow field of an inferior tribunal. If procurators are chosen (and sometimes, though very rarely, a procurator will be the best possible man), we repeat what we have said before, that they should be sent to districts other than those in which they have practised, to prevent local jealousies, and remove them from local prejudices and associations. We know little of Mr Taylor or his qualifications, but the presumption against him is materially strengthened by the fact that his appointment as Procurator-Fiscal dates from 1832. We have only to add, that we impute no unworthy motives to Mr Cook; but we regret that those who are not aware of his high and honourable spirit should have any excuse for doing so. We regret also, for his own sake, that he should have by this act shown himself so entirely out of *rapport* with the universal feelings and opinions of the branch of the profession to which he belongs.

George Skene, Esq., Advocate (1830), since 1855 Professor of Scotch and Civil Law in the University of Glasgow, and previously Sheriff-Substitute of Lanarkshire at Glasgow, has been appointed Curator of the Historical Department of the General Register House, Edinburgh, in place of the late Dr. Joseph Robertson. We are not sufficiently acquainted with Professor Skene's qualifications for the office to be able to state what they are. Some justification of the appointment may perhaps be found in the manner in which he discharged the duties of his Chair in Glasgow.

Alexander Henderson Chalmers, Esq., W.S. (1854), has been appointed Commissary Clerk of Aberdeenshire in place of J. H. Chalmers, Esq., resigned, and since dead. The fees received by or due to the Commissary Clerk of Aberdeenshire were returned to Parliament as having been £964, 6s. in 1863.

The Scotch Law Chair at Glasgow.—The vacancy caused by Professor Skene's resignation has not yet been filled up. An entirely new course has been followed in the discharge of this piece of public duty. Academic appointments have hitherto been conferred on the persons whose claims seemed highest out of all those offering themselves for the place. This method does not approve itself to the present Government, at least so far as this professorship is concerned. Instead of being thrown open to the whole Bar for fair competition among those having academic aspirations or qualifications, it has been *offered*, one after another, to four or five gentlemen of the Con-

servative party, who have shown their want of liking for the place by *declining* it. Where this singular and discreditable process may end it is impossible to say, as the list of gentlemen eligible on the single ground of allegiance to Lord Derby is of course far from being yet exhausted. We must protest against such a mode of proceeding as showing at once a flagrant contempt for public decency, and an entire disregard of the proper grounds on which the choice of academic teachers should be made.

We learn that at a recent meeting of the Faculty of Procurators at Glasgow, it was resolved to suggest in the proper quarter that the present Law Chair should be confined to the teaching of Civil Law, retaining the present salary. It was resolved that in the event of this being done, the Faculty should undertake to found and endow a professorship for the exclusive teaching of the law of Scotland; and should besides make it compulsory on their apprentices to attend the Civil Law Class. We commend the public spirit of the Faculty, to whom Scotland is already indebted for a new Law Chair. But we have some doubt as to the expediency of making two professorships of law where the emoluments of the one now existing are so small that the Lord Advocate can find no decent lawyer of his party to accept it. Would it not be better to require the new professor to teach two classes, one of civil and the other of Scotch law? That is not beyond the capacity of one man, and it might make the office worthy of the ambition of a thoroughly-competent professor.

Obituary.—HENRY CRAIGIE, Esq., W.S., who died at his residence, Falcon Hall, Morningside, April 19, was a nephew of the late Lord Craigie. He practised in early life as a Writer to the Signet, having been admitted to that Society in 1829, but for many years he had given up all professional business, and devoted his time and ample means to works of benevolence and piety.

WILLIAM HUGH MURRAY, Esq., of Geanies, in the county of Ross, who died at his seat, near Tain, on the 25th April, was eldest son of the late William Murray, Esq., banker, of Tain, by Jane, daughter of Capt. Kenneth Mackay, of Torboll, Sutherland, and was born in the year 1824. He was educated at the High School and University of Edinburgh, and was called to the Scottish Bar in 1846. He was a magistrate and deputy-lieutenant for Ross-shire, and sheriff-substitute of the eastern division of that county. Mr Murray succeeded to the estate of Geanies on the death of his cousin, Miss Janet Murray, in 1845.

JAMES HAY CHALMERS, Esq., advocate, Aberdeen, and Commissary Clerk of Aberdeenshire, died recently at Torquay. He was eldest son of Charles Chalmers, Esq. of Monkshill, Aberdeenshire, and grandson of James Chalmers, Esq., of Aberdeen (representative of Hugh Chalmers, last of Clunie, Banffshire, Minister of Marnoch, who died 1707), by Mary, daughter of Alexander Henderson, Esq.,

of Stanston, Caithness. He was born in 1829, and became a member of the Society of Advocates in 1854, and soon afterwards a partner in the firm of Messrs. Chalmers and Farquhar, at Aberdeen. In 1861 he was appointed to the office of Commissary Clerk, which post he held until a few weeks before his death. He was an ardent student of natural history, especially that of the north of Scotland. He was a still more enthusiastic archæologist, and a Fellow of the Society of Antiquaries of Scotland. At the meeting of the British Association at Aberdeen in 1859, he arranged, along with Mr Charles Dalrymple, the very magnificent collection of antiquities gathered from every corner of Scotland, and relating to every period of its history. Mr Chalmers was for some time an active magistrate for the county of Aberdeen.

Infant Passengers on Railways.—The case of *Austin* v. *G. W. Railway Co.*, decided by the Court of Queen's Bench on 18th April last (16 L. T. N. S. 320), contains a doctrine of some importance. A child three years of age brought his action against the Railway Company to recover damages for personal injuries sustained through the defendants' negligence while carrying him in a parliamentary train. His mother had taken a ticket for herself, but paid nothing for the child. The Railway Company chiefly founded on the fact that the child being more than three years of age, ought to have been paid for, under 7 & 8 Vict. c. 85, s. 6, and this not having been done the company was under no liability. Their counsel contended that though there might be no fraud on the part of the mother (the jury negatived fraud), yet there was a misrepresentation analogous to that made by a passenger conveying merchandise in a box delivered to the company as his personal luggage. In such a case the box is carried at the risk of the owner. *Cahill* v. *L. & N. W. Railway Co.*, 30 L. J. C. P. 289, 31 L. J. C. P. 291. The Court, however, disregarded this contention and held that "the contract, as the jury had found it, was to carry both mother and child. It was entered into," said the L. C. J., "by the mother on behalf of herself and the child; and if the law gives the company any remedy against the mother for making any misrepresentation, whether fraudulent or innocent, they may avail themselves of it. But this does not, under the circumstances, affect the right of the infant plaintiff to recover." The Court seemed to hold that though the infant contracted through the mother, yet he was not affected by misrepresentations made by her, and that the difference in the case of *Cahill* v. *L. & N. W. Railway Co.*, was that there the company did not contract to carry the box of merchandise. Blackburn J., went further and held that, irrespective of contract, a duty was imposed on the company to use proper and reasonable care in carrying the plaintiff, for if he had been killed by the gross negligence of the engine driver, the latter would have been indictable for manslaughter. An opinion has been pretty generally stated that the railway companies must now begin to make

a charge for carrying children in arms in order to cover the risk, seeing that they are responsible for accidents to them. In certain trains, however, they are compelled by statute to carry them free; and, as no novel principle is involved in the case we have cited, it can not be imagined that the companies have hitherto acted under an impression that the law was different, or that they will now find any advantage in changing their system in this respect.

The Representation of the People (Scotland) Bill.—The doubts and uncertainties of many kinds which hang around this measure would prevent us from commenting on it this month, even if we could afford space. But we think it right just to mention the provisions contained in the 21st section, which repeals all enactments now in force regarding appeals from Sheriffs in Registration Courts, and provides in lieu thereof an appeal on a case stated, *both in counties and burghs*, to a new Court of Appeal proposed to be constituted. The section further corrects a serious defect in the act constituting the existing Registration Appeal Court, by enabling the Appeal Court to remit to the Sheriff appealed from to amend the statements in his special case. The proposed Court is to "consist of three judges of the Court of Session, to be named on or before 1st Sept. in each year, by the Lord President of the Court, or failing him, by the Lord Justice Clerk, one judge to be named from each division of the Inner House, and one from the Lords Ordinary in the Outer House," &c. We believe this would be a material improvement on the existing Court, which, though much superior to the old Sheriffs' Appeal Court, does not always pronounce decisions sound in themselves or receiving that unquestioning respect which the judgments of the Inner House generally command. Moreover the constitution of the Court is such that its jurisdiction might come to be extended in the course of time to other classes of cases, so as to relieve the divisions of some of the arrears by which they are still oppressed, and indeed to take the place of that Third Division which has long been suggested. Whether a fluctuating Court, nominated by the Lord President, is the right thing may be doubted.

ROYAL COMMISSION.—The Queen has appointed George Biddel Airy, Esq., the Astronomer Royal; the Earl of Rosse; Lord Wrottesley; Sir John Shaw, K.C.B.; Lieut-Gen. Edward Sabine; Thomas Graham, Esq., Master of the Mint; William Henry Miller, Esq.; and Henry William Chisholm, Esq., Commissioners to inquire into the condition of the Exchequer Standards of Weights and Measures.

THE SELECT COMMITTEE ON RAILWAYS consists of Col. Wilson Patten, Mr Cave, Mr Goschen, Mr Bonham Carter, Mr Dodson (chairman), Mr Woodd, Mr Whitehead, Sir Colman O'Loghlen, Mr Packe, Mr Scholefield, and Sir Edward Colebrooke. The purpose of the Committee is to inquire into the provisions for securing the completion of Railways within a limited time, and to report as to the expediency of altering the Standing Orders requiring such provisions, or the Act 9 Vict. c. 20. The Committee, it is understood, will consider whether the Standing Order of the House of Lords, passed at the end of last session, locking up the deposited capital of new railway companies until a portion of their lines is completed, should be repealed or not.

LAW OF MASTER AND SERVANT.—Lord Elcho's Bill for amending the Law of Master and Servant embodies the recommendation of the committee over which he presided. It proposes to repeal the existing law; to place all questions of contract under the same jurisdiction as civil and not criminal suits, with precisely the same remedy for either party. Magistrates may give damages and impose penalties. If these are not paid they may issue a warrant of distress, and only in default of distress may the party be summoned to show cause why imprisonment should not be inflicted—the term being limited to six months. Criminal offences are to be heard at the quarter sessions.

This will be a desirable reform, but more in sentiment than in reality. It is an apparent injustice that a servant should be sent to jail for breaking his contract with his master, while the master could only be sued in an action for breach of contract with his servant. No wrong was actually done, because the master always paid the damages and the servant rarely or never, and the remedy that was sufficient for the one was insufficient for the other. But justice should not appear one-sided. —*Law Times.*

THE COUNSEL FOR THE FENIAN PRISONERS.—The Irish Government has grevi-ously affronted Mr Isaac Butt. He was named by the Fenian prisoners to conduct their defence, and accepted the office, but the Government only offer him £25 as a retaining fee, and £3, 3s. as a refresher for each day of the trial. Mr Butt refuses to accept those fees, as utterly inadequate, and prefers to defend the prisoners at his own cost, which, as the trials will last weeks and his practice is large, will not be slight. We do not see that Government is bound to select the highest members of the Bar to defend men accused of sedition, but if they do select them, they should pay them as they would if retained on their side. No other Government on earth, except perhaps the American, would pay sixpence.—*Spectator.*

LAWYERS AND DOCTORS.—Law and Medicine are directly at variance on the subject of insanity. Science has made vast forward strides, but law is as it was a century ago. Principles based upon imperfect knowledge of psychology are still gravely propounded from the judgment-seat, and juries are directed to determine a question of life or death upon a ruling utterly opposed to all that science has ascertained to be true.

A remarkable instance of this antagonism was exhibited last week in the case of Karl Andersen, tried and convicted of the murder of a sailor while upon the voyage. There is a superstition amongst sailors that ill-luck attends a ship that has a Fin aboard. In the vessel of whose crew Andersen was one, was a sailor who, although calling himself a Russian, was believed to be a Fin. The ship met with foul weather and many troubles. Andersen was a gloomy fellow, and thought by the sailors to be a little crazed. He had no quarrel with the alleged Fin; he bore to him no personal malice, but his mind brooded upon the thought that he was the cause of all their misfortunes, and he had expressed his conviction that they should all perish if the Fin were not removed. At last he murdered the unfortunate object of his superstition, was seized red-handed, was brought to trial, refused to plead, and was found by the jury to do so obstinately. During his trial his countenance and manner impressed all the spectators with a belief that he was insane. The Judge, however, in strict accordance with the law as it is laid down, told the jury that if the prisoner knew what he was doing, and that it was wrong to do it, he was responsible for his act, whatever delusion might have prompted it. He was convicted and sentenced to death. But the public mind, better informed than the law on the subject of insanity, protested against the verdict, and the sentence is not to be carried into execution.

But wherefore should it be left to the Home office to apply the principles of improved science to the rules of antiquated law—to say, "Legally you are a murderer, morally you are a madman?" If the law, as properly put to the jury by the judge, is a right law, why is it not enforced? If it is a bad law, why is it not altered? It cannot be but mischievous to have one principle gravely proclaimed in the Central Criminal Court, and another principle acted upon by the Home-office. The Judge says "delusion" does not excuse a criminal; but Mr Walpole, in this instance in full accord with enlightened public opinion, says that it *does*, and accordingly he snatches the victim from the gallows to which an erroneous law had consigned him. The moral of this is, that the famous resolutions that profess to define insanity are in conflict with advanced science—that they require revision, and ought to be brought into accord with the psychology of 1867.—*Law Times.*

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

Bell's Trustees *v.* **North British Railway Company.**—*May* 15.

Railway—Level Crossing—Siding—Interdict—Agreement.

Declarator, interdict, and damages, concluding that defrs. had no right to make a siding on the portion of their Railway where it passes through the pursuer's lands of Bellmount, near Falkirk, so as to obstruct, interrupt, or impair the rights and privileges connected with the crossings possessed by them in terms of agreement dated 16th Sept. and 8th Oct. 1851. A proof was led, and various findings were formerly made. Afterwards a remit was made to ascertain whether the siding increased the danger, or materially interfered with the convenience of the crossing.

Lord Curriehill—When their land was originally taken, the pursuers had received ample compensation, and the Sheriff had awarded them accommodation in consequence of the severance of their property by the railway in the shape of a bridge, which the pursuers afterwards by agreement dispensed with, accepting a level crossing and a sum of money instead. Lately the company found it necessary to have a siding, which they made on their own land at a place where they were legally entitled to make it. There was admittedly no conventional prohibition of such a siding; but it was said that they must make the siding so as not to interfere with the level crossing. It was established, however, in point of fact, that the use of the level crossing was not interfered with, provided ordinary care were taken in the use of it—a proviso which was applicable to every level crossing. Ordinary care was incumbent on every person who had such a right, and he was not entitled to be freed from all risk. This action was an attempt to obtain immunity from that ordinary care.

Lord Ardmillan concurred.

Lord President—The report showed that there was no danger beyond that which the proprietor of a level crossing must lay his account with. It would be a public evil to allow the proprietor of a level crossing to tie up a railway company, and prevent them from making the regular and proper use of the line for traffic. Every increase of traffic is an additional risk, which, in the view taken by the pursuer, the proprietor of a level crossing would be entitled to object to; but that is a risk which he has in view when he takes his level crossing as a probable additional burden. Looking at the situation of this property—a few hundred feet from an important station—it was a very natural place for a siding. Nothing was more important for public safety than a proper supply of sidings on railways.

Action dismissed.

Act.—Moncrieff and Gloag. Agents—Wilson, Burn, & Gloag, W.S.
—Alt.—Blackburn. Agents—Hill, Reid, & Drummond, W.S.

SCOTTS *v.* DRUMMOND AND HERIOT.—*May* 17.

Right of Way—Public Place—Seashore—Natural Harbour—Interruptions of Use—New Trial.

A verdict was returned in favour of the purs., fishermen at Coldingham and Eyemouth, upon the first and third of three issues, each of which raised a question as to the existence of a road. The jury negatived the second issue. The defrs. moved for a new trial, on the ground that the verdict was contrary to evidence as regards the first and third issues. The first issue claimed a public road from Coldingham on the south to the harbour of Petticurwick on the north passing through the lands of Northfield. The second related to a right of way for foot passengers from Coldingham shore to the point of the seashore called Burnamouth Harbour, and on to St. Abb's Head, and to the seashore at Petticurwick or Petticowick. When issues were adjusted, the question was raised whether Petticurwick was a public place in the proper sense, and the pursuer consented, by minute, that that question should be open for determination at the trial.

The LORD PRESIDENT—The first ground on which it was contended that the verdict was against evidence, was that there was not evidence that Petticurwick was a public place. There could be no doubt on that question. This natural harbour had been proved to be a public place in the proper sense of the term as used in such questions. It was said that there were no houses or artificial harbour works, nor anything but a natural harbour. But a natural harbour was the best of all harbours; and, if sufficient for its purpose without any works of man's hands, might be as capable of being a public place as any other place. That was not the question, however, but rather whether the harbour had in fact been used. The Court had laid down in a former case (Darrie *v.* Drummond, Feb. 10, 1865, 3 Macph. 496), that a mere point on the seashore was not a public place in the sense in which a public right of way must have its terminus at a public place, unless indeed there be an explicit averment of the uses profitable or useful made of the shore after getting to it, and which were the object of getting to it. The case was different where the place had been used by the public. This natural harbour was near St. Abb's Head; and in certain states of the wind, when it was difficult to get round the promontory, it was used, according to the evidence, as a harbour of refuge by the fishermen of the coast. It was in evidence that some of them had had their lives saved by means of it. There was thus an attraction to the place, for it was proved not merely to be a desirable resort, but an indispensable harbour of refuge. That was probably the first cause of the use of the place; but its use by no means ended there. The fishermen, having become familiar with it, resorted thither on other occasions. Boats were drawn up, and even left to winter there. Fish were landed, and conveyed away to market by the very road in the first issue. There was also evidence that things were brought to the place for the use of the boats, and that others than fishermen resorted to it. The fishermen may have had the chief use, but the evidence went considerably beyond that, and there could be no doubt that it was a public place in the proper sense. It was suggested upon two other grounds that the road had not been proved to be a proper public road. (1.) That the use had been by fishermen only. His

Lordship gave no opinion as to the effect of that, if it had been proved; but it was clearly not in the evidence, although it might well be that the people of the neighbourhood consisted chiefly of fishermen. (2.) That there had been successful interruptions of the use. These interruptions were said to have been effected, when the fields through which the road passed were in crop, by ploughing up and sowing the *solum* of the road along with the rest of the fields. It is true that there was some evidence of that having been done, and it would have been an important circumstance if it stood without other evidence, and had had the effect of putting an end to the use of the road. But it was not so. Along with this there was evidence that, notwithstanding the ploughing, the road continued to be used. His Lordship gave no opinion as to the amount of that evidence, but certainly on that point there was a fair case for the jury to consider. As to the third issue, it was conceded very fairly by the defenders' counsel that, if he did not succeed in obtaining a rule with regard to the first issue, he could not make out any separate case as to it.

The other Judges concurred, and the rule was refused.

Act.—Gifford, Asher. Agent.—T. Whyte, S.S.C.——Alt.—Duncan. Agents.—Jardine, Fraser, and Stodart, W.S.

COLQUHOUN *v.* WALKER AND OTHERS.—*May* 17.

Charter—Prohibition to Subfeu—Alternative holding—Reduction—Irritancy.

Reduction, Declarator, and damages at the instance of Sir James Colquhoun, the superior, against Walker the original vassal, and several others, disponees of Walker, in subjects in Helensburgh, held under a feu-contract, by which Walker was bound to pay £1, 10s. per ann. of feu-duty, the entry of heirs was taxed at a duplicand of the feu-duty; and the entry of singular successors was untaxed. It was provided "that it shall not be competent to, nor in the power of, the said John Walker or his foresaids to sub-feu, sell, or dispose of all or any part of the subjects hereby feued out, to be holden of himself and his foresaids, or of any other interjected superior; but allenarly to be holden of and under the said Sir James Colquhoun and his foresaids as superiors thereof, in all time coming, without prejudice, nevertheless, to the said John Walker and his foresaids to grant securities, or to exercise any other act of ownership not inconsistent with the manner of holding hereby prescribed." The precept of sasine granted warrant for infefting Walker or his foresaids "with and under the provisions, declarations, and restrictions, and subject always to the payment of the feu-duty and performance of the conditions before mentioned, and which are to be real burdens affecting the subjects hereby disponed, and to be engrossed in the infeftments to follow hereon." There was no clause of irritancy, and no obligation upon purchasers to enter within a specified period. Walker granted a disposition in common form, containing procuratory of resignation, obligation to infeft by double manner of holding, and a precept of sasine *a me vel de me*, upon which the disponee was infeft. Several subsequent transmissions took place by dispositions in the same terms, on all of which the disponees were infeft. None of the disponees entered with the superior. This action concluded for the reduction of the original feu-contract and the subsequent dispositions and sasines, and for declarator that the property of the subjects in question had reverted to the superior; or

otherwise, for damages for violation of the prohibition to sub-feu. The contravention of this clause was said to have been effected by the granting of the precept with double manner of holding and sasine taken upon it, which it was said must be held to be a base infeftment till confirmed by the superior.

The Lord Ordinary (Ormidale) assoilzied the defenders. The pursuers reclaimed. (Authorities:—Bell's Pr. 70, 71, 723, 865; Bell's Com. I. 29; Coutts v. Tailors of Aberdeen, 1 Rob. App. 296; 1 Bell's Illust. 81; Hyslop and Shaw, March 13, 1863, 1 Macph. 548; Campbell v. Dun, 1 W. S. 690, 6 S. 279; Montgomerie Bell's Lectures, 580; &c.)

Lord President.—The first question was whether the pursuer had libelled any sufficient ground for reducing the title of his own vassal. That was very clear. It was contended that the prohibition was lawful and a condition of the holding, and no doubt the superior was entitled to enforce it. His Lordship could understand that being effected by annulling the thing done; but to annul the right of the party doing it was beyond the exigencies of the case. The pursuer had a right to enforce his contract, but not to annul it. An irritancy in the feu-contract would have been sufficient for that purpose, though an irritancy would not have grounded a reduction, but a declarator of irritancy. But no irritancy was stipulated, nor penal consequences of any kind; and the Court could not import such clauses into the contract. The case of Coutts *v.* Tailors of Aberdeen, was not applicable to this part of the case, for that case only decided that such a condition, if made real, transmits against singular successors, and has no bearing on the question of remedy. The second question related to the subsequent titles. What was asked was total reduction; and though the possibility of a partial reduction was suggested, the pursuer's counsel frankly conceded that that was not what he wanted. It was therefore unnecessary to decide either the general competency of granting partial reduction or its competency under this summons. His Lordship thought the reasons of reduction insufficient. The disposition by Walker to Bogle, the first purchaser (for it was enough to deal with one as a specimen of all the transmissions), was in the most usual of all the forms of conveyance—a form which was not intended to create a permanent base right. The object of the double manner of holding was, on the contrary, to create a right which should ultimately place the disponee in the shoes of the disponer; and there was no reason to doubt that this disposition was truly granted with that purpose. There was nothing in the dispositive clause violating the condition of the feu-right. There was no doubt as to the procuratory, which the vassal had a right to grant; and if the obligation to infeft had been confined to the *a me* holding, that would have been unobjectionable too. Thus, after all, it was a mere fragment of the title that was objectionable—viz., that which enables the disponee to take an infeftment, which, whether it be good or bad, has the *appearance* of a base right. It involved a gross inconsistency for the superior to ask reduction of a disposition and infeftment which he might be asked to-morrow to confirm.

Lord Curriehill acquiesced, adding that the action from beginning to end was founded on a mistaken view of the nature and effect of the obligation to infeft with a double manner of holding.

Lord Deas and Lord Ardmillan concurred—the latter observing that the superior had no interest to sustain the conclusions of the action, and

that he could not see his way under the conclusions of this action even to a partial reduction of the titles.

Adhere.

Act.—Cook, Adam. Agents—Tawse & Bonar, W.S.——Alt.—A. R. Clark, Gifford, and Guthrie. Agents—Dundas & Wilson, W.S., and J. & R. Macandrew, W.S.

SECOND DIVISION.

THOMSON *v.* PHILP.—*March* 25.

Promissory Note.

A document in the following terms:—"£40—Twelve months after date, I promise to pay to Mrs July Paton Young or James Young, carter, Carnehill, on their order, the sum of £40 with interest, (signed) Robert Philp, Carenhille, 20th Sept 1862." Held not to be a promissory note in respect of uncertainty in the payee.

Act.—Fraser, Scott. Agent—J. Galletly, S.S.C.——Alt—Thomson. Agent—G. Wilson, S.S.C.

DAVIDSON *v.* DAVIDSON.—*March* 28.

Jus mariti—Communio bonorum—Alimentary Fund.

The pursuer, Alex. Davidson, was married to the deceased Jean Tawse, and they lived in her father's house for some time, and had issue, one of whom is the defr., William D. Alex. D. then left his wife and family, and lived separate for twenty-four years, till her death in 1865. She continued to live with her father, and worked as a laundress, and at her death left £60 deposited in bank, the receipt for which she transferred shortly before her death to the def. The pursuer had not contributed to his wife's support, but occasionally borrowed small sums from her. He raised an action in the Sheriff Court of Kincardineshire for the £60 as his property, as part of the *communio bonorum*. The Sheriff Substitute sustained the claim. On appeal, the Sheriff reversed. The pursuer advocated; but the Court adhered.

LORD JUSTICE-CLERK—The general rule of law is that the husband is entitled *jure mariti* to what his wife acquires by industry. But here there is in the special circumstances sufficient evidence to infer an agreement that the wife was to keep her earnings as an alimentary fund. It is proved that the husband knew of the existence of this money; and he borrowed from his wife, and repaid from time to time. Savings from an alimentary fund are at the wife's disposal. The husband may agree by writing that her earnings shall be an alimentary fund, if they amount to no more than a reasonable sum. But such an agreement may also be proved, as here, in other ways.

The other Judges concurred.

Act.—Young, John Burnet. Agent—John Thomson, S.S.C.——Alt.—Fraser, Gebbie. Agents—Macgregor & Barclay, S.S.C.

ABERDEIN *v.* STRATTON'S TRUSTEES AND ANOTHER.

Process—Relevancy—Sale by Auction—Sale of Heritage—Title to Sue—Reduction.

Stratton's trustees exposed certain heritable subjects in Montrose for sale by public roup, in Oct. 1864, upset price £460. Pursuer's agent offered the upset price, and, after competition between him and Mr John Fairweather, the only other bidder, the subjects were knocked down to pur. at £655. He avers that he then discovered that John Fairweather was not a fair bidder, but acting in collusion with, and on behalf of the exposers, or at least David Fairweather, one of them. The pursuer refused to subscribe his last offer, and made a notarial protest. The trustees then conveyed the subjects to John Fairweather at £650, the amount of the offer immediately preceding the pursuer's last. The pursuer now seeks to reduce the offers after his own offer of the upset price, and the disposition to John Fairweather, and concludes to have the subjects declared to be his on payment of either £460 or £655, and for damages. Preliminary defences were lodged against satisfying the production, and the Lord Ordinary reported the case on issues. In the Inner House a minute was lodged consenting to the preliminary defences being repelled, and to satisfy the production, and holding the record to be the record on the merits. The trustees objected (1) to the pursuer's title to sue on the ground that he had no written title, and (2) to his allegations as vague and irrelevant.

The LORD JUSTICE-CLERK said that the case could not be maintained upon the last offer of £655, because the pursuer had refused to subscribe it. His title therefore must rest on the offer of the upset price. That offer was not subscribed, and the ordinary rule which makes writing essential in bargains concerning heritage must apply. If the pursuer had offered to subscribe, it might have been different. Moreover, his averments of unfairness upon which the reductive conclusions were based were too vague.

Lord COWAN concurred. It was not absolutely necessary to decide the question of title to sue, because the averments were irrelevant. It was not sufficient to reduce the bodes to say that John Fairweather acted for David as an individual, which was one alternative.

Lord BENHOLME. Both the title and the merits depended on the same consideration—viz., that this bargain concerning heritage was not instructed by writing, and neither party could plead upon it.

Lord NEAVES. The objection that there was no writing was properly one on the merits, and not to title. Verbal contracts as to heritage, if well proved, as by admission or reference to oath, may be enforcible. The principle only means that there is *locus pœnitentiæ*. But here it may be that the progress of competition constituted *rei interventus*. He therefore based his judgment on the ground that the averments of unfairness and collusion were plainly irrelevant.

Act.—Decanus, Asher. Agent—James Webster, S.S.C.——Alt.—Sol.-Gen. Millar, Gifford, W. M. Thomson. Agents—John Henry, S.S.C., and William Burness, S.S.C.

SMEATON *v.* ST ANDREWS POLICE COMMISSIONERS.—*March* 30.

Police—Public Commissioners—Sewer—25 & 26 Vict. c. 101*—Agreement.*

Police Commrs. made an order for the execution of a main sewer

through purs.'s lands. He appealed to the Sheriff, who substantially confirmed the line chosen by the Comms., and whose decision, by the statute, is final. Smeaton then claimed compensation. Negotiations for a compromise were entered into; and the Comms., 12th Feb. 1866, by a majority of one, adopted a minute of agreement proposed by purs., by which they undertook to make a deviation from their line at additional expense, and he was to abandon his claims for compensation. On 3d March 1866, they resolved to adhere to the line approved of by the Sheriff. Smeaton raised the present action to hold them to the agreement. The Lord Ordinary assoilzied on the ground that all further negotiation was barred by the decision of the Sheriff. The Court recalled. Parties were now heard on another preliminary plea, that it was *ultra vires* of the Comms. as a statutory body to enter into any agreement. It was assumed for the purposes of this argument, though not admitted, that a binding agreement had been executed.

Lords COWAN, BENHOLME, and NEAVES could not assent to the proposition that it was *ultra vires* of the Comms. to bind themselves by any agreement, and that the action ought therefore to be dismissed *de plano*. No doubt, the agreement might be of such a nature as to be *ultra vires*. But, if so, it must either be reduced, or, at all events, objected to in this action on grounds that would infer reduction. The agreement itself was not admitted, and the details of it were not before the Court. Therefore, as the parties did not renounce further inquiry, the case ought to be remitted to the Lord Ordinary.

The LORD JUSTICE-CLERK concurred in the course proposed, as he thought the nature and validity of the agreement ought to be inquired into before the case was disposed of. But, as at present advised, he had the greatest possible doubt whether the Comms. could bind themselves and their successors to an agreement which they afterwards came to think was not for the public interest, and which required further procedure—such as giving notice, and, it might be, litigation, to carry out a scheme which the Commissioners considered detrimental.

Act.—Clark & Balfour. Agents—Maclachlan, Ivory, & Rodger, W.S. —*Alt.—Cook, Campbell Smith. Agents—Maitland & Lyon, W.S.*

HOUSE OF LORDS.

JENKINS *v.* ROBERTSON AND OTHERS.—*April* 4.

(In the Court of Session, June 9, 1864, 2 Macph. 1162.)

Res Judicata—Right of Way—Transaction—Declarator.

Declarator that "there exists a public right of way for foot-passengers along the right bank of the river Lossie, upon the property of North College, extending from the public road near the south or west end of the Cathedral or East Brewery Bridge, Elgin, and running along the said river to the public road leading from Elgin to and past Deanshaugh," &c. The pursuers were inhabitants of Elgin: William Jenkins, shoemaker in Elgin;

William Halket, gardener, Elgin; Alexander Youngson, Lossiemouth; and Alexander Simpson, of Llanbryd. The defenders were Alexander Robertson, of the National Bank of London; William Grigor, writer in Elgin; Charles Horsfall Bell and William Hay, both residing in Elgin. The defenders pleaded *res judicata*, a similar action for precisely the same subject-matter having been raised in 1860, in which the Provost, Bailies, and Town Council, and two inhabitants of Elgin, were pursuers, and the defenders were the same as in this case. In that action in July 1861, the jury found a verdict for the pursuers. Afterwards a rule was made absolute for a new trial; but the pursuers afterwards consented to a decree of absolvitor in favour of the defenders, and the order for the new trial was discharged. Nine months after this arrangement was made this action was raised. The Lord Ordinary (Jerviswoode) sustained the plea of *res judicata*, and the First Division adhered, Lord Curriehill diss. The pursuers appealed.

The Lord Chancellor (Chelmsford)—The interlocutor in the former action having been the result of a compromise between the parties, it could not be regarded as a *judicium*: nor could it be admitted as a *res judicata*. On one part of the case his lordship had considerable doubt; viz., whether any individual could constitute himself the representative of the public in a declarator of a public right of way, so as to preclude an action by any other person, and to make the plea of *res judicata* a bar to such action.

Lord ROMILLY concurred. On the first point he desired to express no confident opinion one way or the other. By English law he apprehended that no party would be precluded in such a case by a prior judgment, and that all the effect that could be given to it would be that that judgment should be given in evidence upon any subsequent trial of the question. But English law was not familiar with that form of action (a very desirable one) which obtained in Scotland, the action of declarator, in which the whole question might be gone into. His lordship was not prepared to say that if the question had been fully gone into and fully discussed, the decision of the Court upon it would not have bound all persons who subsequently attempted to try the same question. If the pursuers could not represent the public, the public could never be represented in any such action, because they must always be in the same situation. On the second point his lordship had a clear opinion. By the very words, *res judicata* meant a matter on which the Court had exercised its judicial mind, come to the conclusion that one side or the other side was right, and given a decision accordingly. In such a case as this, where the Court merely registers an interlocutor arranged by the parties, without expressing any judicial opinion, it was contrary to all principle to consider that that could be treated really as *res judicata*. It was admitted that it could not be so treated if it was done by collusion or fraud. It was true that in this case no fraud was alleged; but in such cases it was very difficult to prove fraud, and the result of sustaining the plea would be that in every case where one person had brought a declarator and it was compromised, the public would be bound unless some one could prove fraudulent collusion between the parties. That was not the meaning of *res judicata* according to the law of any civilized country. Neither was it for the Court to ascertain whether or not this was a reasonable compromise.

LD COLONSAY had a very distinct opinion that in an action of

declarator to establish a public right of way, the verdict and judgment upon the question whether it is a public right of way or not, was a conclusive settlement of that question. There was a material distinction between the law of England and that of Scotland upon this subject. There was no action of declarator in England to establish a right of public way open to any individual in the community who might choose to raise it; but if there was such a right in Scotland it was a material question whether any conclusion could be put to such an inquiry. It was because the door was so widely open that there must be a mode of shutting that door in due time. The dicta on this point were very clear. His lordship referred to those of Lord Fullerton in Greig v. Mag. of Kirkcaldy, May 21 1851, 13 D. 975, and of Lord St Leonard's in Torrie v. D. Athole, 3d June 1842, 1 Macq. 65. In this case those who raised the first action were the parties who of all others had the most interest in having this public right of way established. If the case had gone on to a conclusion in the ordinary way there could be no doubt that the question would have been concluded by the verdict and judgment. But it was different, if such an action having been instituted, something was done which interfered with the ordinary course of justice and limited the question tried.

The second point was regarded in the Court below as a question of great difficulty. Every one of the judges expressed his opinion on it with hesitation. His Lordship himself by no means entertained in that Court a confident opinion on it, though he was not disposed to alter the opinion of the L. O. But there was an element in the case which he was bound to say he thought might be founded on to sustain the judgment now proposed,—viz., that there was something given for the settlement of the case—it was to a certain extent purchased. That might be founded on as disturbing the ordinary course of procedure. The defrs. might have followed out their notice of trial, and if they had obtained a verdict or the other party had failed to maintain his action, the case might have stood in a different position. But when the defenders, the heritors, give something to the other party for obtaining the judgment, that introduced an element as to which he could not say that it did not entirely sustain the proposed judgment.

Reversed and remitted to Court of Session to be proceeded with.

Act.—C. Scott, J. S. Will. Agents—Crawford & Guthrie, S.S.C., and Holmes, Anton, Greig and White, Westminster.——Alt.—Att.-Gen. Rolt and Anderson Q.C. Agents—Gibson Craig, Dalziel, and Brodie, W.S., and Martin and Leslie, Westminster.

FORBES *v.* EDEN, AND OTHERS.—*April* 11.

(In the Court of Session, Dec. 8, 1865. 4 Macph. 143.)

Church—Reparation—Reduction.

Action by a clergyman of the Scottish Episcopal Church concluding for reduction of certain canons enacted by that Church, which altered those in force when he was ordained; for declarator, that the alteration was *ultra vires* of the Synod, and that he was entitled to celebrate divine service according to the former canons, and for damages accruing to him through his bishop's refusal to licence a curate engaged by him (the pursuer) who would not subscribe the new canons.

The Lord Ordinary (Barcaple) found the averments irrelevant and insufficient to support the conclusions of the action, and assoilzied the defenders, the members of the General Synod which enacted the new canons; and the Second Division of the Court of Session adhered. The pursuer appealed.

The LORD CHANCELLOR (Chelmsford) in an elaborate judgment, observed that app. had not alleged any actual damage, except in the refusal of licence to his curate, but founded his action on the possibility of his sustaining damage, being a member of a voluntary association, by the departure from his original obligation. Supposing app. really to have sustained damage it would have been open to the Court to consider whether the Synod of 1863 had any right to make the canons complained of, but actual damage by that code of canons was wholly out of the question. The Court, therefore, had to consider whether reduction was competent on the ground that they were a departure from the doctrine and discipline of the Church at the time the appellant received admission. The Court refused to reduce the canons on that ground. There was no analogy between this case and Macmillan *v.* Free Church, because there there was an actual sentence of deposition. In this case the app. had not been disturbed in his charge as minister of the Episcopal congregation at Burntisland, or in his legal position as a minister of the Scotch Episcopal Church. He contended that the canons of 1838, under which he became a member of this voluntary association amounted to a contract, and that the enactment of the canons of 1863 was *ultra vires* of the Synod, or of any number of the members short of the whole body, that it was a violation of that contract, and injuriously affected his position as a member of the association. It did not appear to his lordship that the code of 1838 could properly be considered a contract, or assuming that it was, that the canons of 1863 were substantially a violation of the code of 1838. That code related principally to order and discipline, and the 33d canon of 1838, distinctly declared that the General Synod of the Church regularly summoned, had power to alter, amend, and abrogate canons, and to make new canons. The app. complained that the new canons displaced the Scotch communion office, and substituted the Book of Common Prayer, to some portions of which he had conscientious objections, particularly in regard to the ceremonial of marriage, the visitation of the sick, and the burial of the dead; but under the canons of 1838, express permission was given to use the English Prayer Book, and they also sanctioned the substitution of the one for the other. It had been shown that there was no uniform, and, consequently, no recognised practice in the Scotch Episcopal Church with respect to the Communion office. Different forms were used by different congregations, and all the congregations made one Church. In almost all points the canons of 1863 substantially agreed with those of 1838. If the Bishop had authority to grant or refuse a licence according to his discretion no valid cause of complaint could arise, but if he wrongfully refused he would be personally liable. The General Synod could not be liable for that in any way. If a licence was withheld it would be for the curate to complain, not the app., who merely complained in respect of the remote consequences of suffering in his health by being deprived of the assistance of a curate.

LORD CRANWORTH.—There was no authority in the Courts either of England or Scotland to take cognizance of the rules of a voluntary society entered into merely for the regulation of its own affairs, save only so far as it might be necessary to do so for the due disposal or administration of

the funds established for the benefit of its members. The Court must necessarily take cognizance of the rules and regulations of a voluntary society for the purpose of satisfying itself who are entitled to its funds;, so where the rules of a religious association prescribe who shall be entitled to hold a house, chapel, or other building. That was the principle on which the Court had administered funds held in trust for dissenting bodies. There was no direct power in the Court to decide whether A or B held a particular situation according to the rules of a voluntary society; but if a fund held in trust is to be paid over to a person who, according to the rules of that association, fills that character, the Court must make itself master of the facts to enable it to decide whether A or B is the party entitled. These considerations went to the root of this case. The alterations in the canons of which the appellant complained, assuming them to be beyond the power of the Synod, gave no jurisdiction to the Court of Session to reduce the rules of the voluntary association of which he was a member, or to inquire into them at all. If he was dissatisfied with them his remedy was to withdraw from it. Incidentally, the Court might have imposed on it the duty of inquiring into the regulations of such societies or the proceedings of individual members of it—for instance, to ascertain to whom a chapel or school belonged. This disposed of the whole case, for the app. alleged no violation of any legal right which would enable the Court to inquire into the general truth of the charge founded on the alterations in the canons of 1838. Assuming, however, the Court to have power to reduce the canons of 1863, had the app. shown any ground for such reduction? The app. rested his case on a supposed analogy between the Scotch Episcopal Church and an ordinary commercial partnership. He contended truly that, unless so far as the articles of partnership authorise it, no change can be made in its provisions by the mere will of a majority of the partners, nor indeed without the concurrence of every individual of which the partnership is composed; and that on the same principles a Synod, or General Assembly, can have no power to alter the canons or rules of a Church or religious body without the consent of every member of it, except so far as they are expressly authorised to do so by the terms of their constitution. But the Synod of a Church resembled rather the legislature of a State than the articles of association of a partnership. A religious body, whether connected with the State or not, formed an *imperium in imperio*, of which the Synod was the supreme body, when there was not, as in the Church of England, a temporal head. If this were so, it was impossible for any canons which they established to be treated as *ultra vires*. The Synod was supreme. It might, indeed, be that a Synod or General Assembly of a religious body had no power to affect civil rights already acquired under existing canons or rules; but that was very different from saying that the canons or rules themselves had no force among those who had no such complaint to make. Upon the whole, he was of opinion, first, that the canons made from time to time by the synods of the Episcopal Church in Scotland, were to be treated merely as the rules of a voluntary society, over which the Court of Session had no jurisdiction, except in cases where the interpretation of them is necessary in order to determine a right of property depending on such construction; secondly, That no such question of right was raised on this record, and that the app. had not laid any valid cause of complaint.

Lord Colonsay concurred.

Act.—Party, Sir R. Palmer, Q.C., Fitzjames Stephen——Alt.—Att-Gen. Rolt, Mundell.

SOMERVILLE'S TRUSTEES *v.* DICKSON AND OTHERS.—*May* 16.

(In the Court of Session, March 3, 1865, 8 Macph. 602.)

Husband and Wife—Post-nuptial Contract—Construction.

Colonel Somerville married Miss Eleanor Dixon in June 1816. There was no antenuptial contract, but in August 1818, they executed a post-nuptial contract. Mrs Somerville died 10th Nov. 1840, and Colonel Somerville on 7th March 1863, leaving one child, the claimant, Mrs Dickson, being the only child of the marriage, a son having died in infancy. Both children were born after the execution of the mutual settlement. On 3d Feb. 1852, Colonel Somerville executed a trust-disposition and settlement whereby he revoked all former wills and deeds of settlement, and made a variety of bequests. Several codicils were afterwards added. The effect of Colonel Somerville's will was that, after payment of certain legacies (chiefly to his own nephews and nieces, and grand-nephews and nieces, and to his wife's nephews and nieces), the trustees should pay the annual interest of the residue of his estate to Mrs Dickson and her husband, during their lives; the estate afterwards to go to their children in fee; and in the event of there being no children, to go "to my nephews and nieces, and grand-nephews and grand-nieces, of the Russel family." Mrs Dickson claimed, in respect of the mutual settlement of 1818, the whole of the estate—which she contended was by that deed settled on her as the only child of the marriage. The question on which the case chiefly turned was, whether that deed could be considered as settling the estate not only in the event of the wife's survivance but also in the event of the survivance of the husband. By the settlement, Colonel Somerville made over "to his spouse, in case she survives him, the full liferent right of every property, &c., that may pertain to him at his decease for her liferent use allenarly;" and "upon the decease of the said Eleanor Dixon the whole subjects, &c., liferented by her as aforesaid, are hereby conveyed to the child or children of the marriage," and in the case of there being no children of the marriage, it is declared "that the whole property to be liferented as aforesaid shall belong and accresce to the heirs and executors of the said H. E. Somerville or his assignees, upon which he reserves the power of bequeathing and disposing of as he may think proper." Mrs Somerville accepted of these provisions as in full of all legal claims, and on her part conveyed to her husband and the children of the marriage in fee, and failing these to him and his heirs, £1000, the sum to which she was entitled by her father's will; and it was provided that should she survive her husband without children she should be able to dispose by will of the £1000. There were no words in the disposing parts of the post-nuptial settlement directing what should be done in the event of the husband's survivance.

The Lord Ordinary (Barcaple) held, with hesitation, that the post-nuptial settlement of 1818 was binding whichever of the spouses survived, and that Mrs Dickson was entitled to the whole free estate of the testator. The Second Division recalled, and held that the post-nuptial settlement was intended only to operate in the event of the testator's wife surviving him, and to meet a temporary contingency of premature death of the testator; but as she had predeceased him, that settlement was not operative.

Mrs Dickson appealed.

The Lord Chancellor (Chelmsford) said there were two questions raised. First, whether the settlement of 1818 was limited to the single event of Mrs Somerville surviving? and the second, if it was not so, whether it was revocable by Colonel S. without consent of his wife, or, at all events, whether it was revocable so far as regarded his gratuitous alienation? The first question turned on the language of the deed, and decisions as to other settlements could be of little use, except so far as they threw light on the meaning of the words employed in the deed. The settlement consisted of two parts. The reason why it was made was stated to be that the parties were married without entering into written articles as to the division of, or succession to, any property then belonging to them, or which they might acquire or succeed to, or interest which they or their children might have in the event of a dissolution of the marriage by the death of one or other or both of them. This, it was said, seemed to imply that all the usual events in a will were to be provided for, whereas some of those events could not be provided for if the effect of the settlement was restricted to the event of the wife's surviving. Now, the object of the settlement was stated to be "in order to regulate the interests which the said Henry Somerville and Eleanor Dickson are to have in the property, means, and estate presently belonging to them," and the children were not mentioned in this part. Then there is a disposition to Eleanor Dickson, "in case she survives him," of the full liferent right of the property for her liferent use allenarly, but reserving power to him to burden the estate. It was argued by the appellants that it was necessary to insert the words "in case she survives," because she could only have taken a liferent in that contingency, but that those words were not essential, and were mere surplusage as regards the other provisions of the deed. But there was a well-known rule of construction which ought not to be disregarded, and that was that no words are to be treated as surplusage if they can be given effect to consistently with the rest of the will. Now, if those words, "in case she survives," are to be held as running through the whole of the will, they become emphatic, and afford the key to the construction of all the rest of the deed. There was, it is true, a gift of the whole means to the children "on the decease of the said Eleanor Dixon," but that might be taken to mean a gift of the estate after she had so life-rented the same. It was argued that it could not have been intended to give the wife a conditional gift in the event of her surviving, because on her own part she made an absolute gift of her own property to the husband. But no great weight was to be attached to that circumstance, for it was enough to say that that was the result of the mutual agreement. His lordship thought the construction put on the settlement by the Second Division was correct—namely, that it was meant to be entirely conditional in the event of the wife surviving her husband; and being of that opinion, it was unnecessary to say anything upon the second question.

Lord Cranworth said the question depended on the meaning of the words "in case she survives him"—that is, in case Mrs Dickson's mother survived her father. If the whole settlement was contingent on that event, the appts. would take nothing under it, for her mother did not survive her father. After the death of his wife, Colonel Somerville thought the settlement was no longer binding upon him, and disposed of his estate in a different manner. It is true that the case could not be much influenced by the fact that the party to that settlement put a particular construction upon it, if it

was inconsistent with the right construction; but, if a will was capable of two constructions, and one of those constructions was consistent with the ordinary views of mankind in such settlements, and the other construction was not, that might not unreasonably be used as a guide in preferring the former construction. Now, it was very improbable that Colonel Somerville, a young man, who, if his wife predeceased him, would be likely to marry again, should lock up his whole estate, and prevent himself from making any provision for the children of a second marriage; but, of course, however impossible it might be, still, if the clear meaning of the deed was to do so, it was useless to indulge in speculations of this kind. Now he (L. Cranworth) did not think the language of this settlement led to the result contended for by the appts' counsel. Upon the view of the context, the words "in case she survives him" governed the whole of the provisions in the will. The clause relating to the disposition of the estate to the children upon the decease of the mother may be read as being a disposition to the children after it had been liferented by the mother. In short, the object was not to make a provision for the children, but only to regulate the division of the property between the spouses.

Lord WESTBURY took a different view of the construction of the deed; but as the question was one merely of the construction of this particular deed, he thought it would be better to abstain from stating fully his reasons for dissenting.

Affirmed with costs.

Act.—Sir R. Palmer, Q.C.——Alt.—Anderson, Q.C.

HERITORS OF BANCHORY-DEVENICK *v.* THE MINISTER.—*April.*

(In the Court of Session, Feb. 3, 1865, 3 Macph. 482.)

Teinds—Valuation.

In this process of augmentation the heritors pleaded that the whole teinds had been valued and exhausted, and they produced old decrees of valuation to support that plea. They also urged that this had been the understanding in the parish for a period beyond the period of prescription, there being not enough to yield the minister £150 a year, and consequently on that footing he had drawn yearly sums from the exchequer in supplement of what he obtained from the teinds of the parish. The minister averred that there were lands in the parish the teinds of which had not been valued, and that the free teinds thence arising were £992, 2s; that the whole lands mentioned in the decreets of valuation founded on by the heritors were not valued, but only those portions of the lands which, at the dates of the decrects, were corn lands, and under cultivation; that since the dates of the decreets a large portion of land had been brought under cultivation, and yielded a large rental, which was capable of affording the desired augmentation of stipend. In particular, a decreet of valuation of the lands of Banchory, dated 1695, omitted several parcels of land; and a decreet of the lands of Findon, Cookstoune, and others, dated 1682, as well as a decreet of the lands of Portlethen, and dated 1709, included only such lands as were then corn-lands. The Teind Court ultimately modified a stipend of twenty chalders of victual; but this modification was to depend upon its
wn to the Lord Ordinary that there existed a fund for the purpose.

The Lord Ordinary (Barcaple) decided as to certain questions against the minister. On reclaiming, the Second Division recalled, in part, the Lord Ordinary's interlocutor, and found that as to the decreet of Banchory his lordship was right, but that the other two decreets omitted certain subjects from the valuation. The heritors appealed.

Lord CRANWORTH—No doubt the general rule is that when all the lands included in a parish valued for teind are valued by a decree, this puts an end to all future questions. Nevertheless it is competent for the minister to show that certain lands were not included in the decrees, especially if the decree itself does not on the face of it purport to include all the lands. Now, it was a legitimate inference in this case, from the language of the decrees, that they did not exhaust the lands in the parish; and on that very short ground he came to the conclusion that the interlocutor of the Court below was right.

Lord WESTBURY concurred. Though it was of great importance that after such a lapse of time decrees should receive effect, still there was nothing inconsistent with that principle in holding that if the decree on the face of it did not exhaust the lands, the lands omitted might now be added to the valuation.

Lord COLONSAY felt considerable anxiety as to this case, and agreed with what had been said as to the importance of not lightly disturbing decrees of such long standing; but there was that on the face of these decrees themselves to justify further inquiry, and the Court below was right in holding that such inquiry should be now allowed. It was, of course, impossible to say whether in the result the evidence would be sufficient, and though the *onus* was now on one party it might be shifted to the other party in the course of the proceedings, and it would remain for the Court, after the evidence had been completed, to say how far the case of the minister had been made out.

Affirmed.

HIGH COURT OF JUSTICIARY.

(Lord Justice-Clerk, Lords Cowan and Jerviswoode.)

SUSP.—HENDERSON *v.* WHYTE.—*May* 15.

Conviction—Furious Riding—Locus—Specification in Minor.

Susp. of conviction before Sheriff-Substitute of Forfar, for culpable and reckless or furious riding on a public road, and to the danger of the lieges. The minor proposition set forth that on 22nd Jan. the susp. "did culpably and recklessly or furiously ride a horse along the public road leading between Brechin and Auldbar Road Railway Station, in consequence whereof said horse did, on a part of said road distant 100 yards or thereby from its junction with the B. and F. Turnpike Road, in the parish of B. and county of F. aforesaid, come into contact with the person of G. S. while walking along the said road between B. and A. Railway Station, whereby he was thrown or knocked violently to the ground," &c. Objected that complaint was defective in specification, in respect that the locus was not properly

set forth, and that the direction in which the suspr. was riding was not stated. The charge was that he had ridden furiously along the whole distance from Brechin to Auldbar Road Station, but it was only attempted to prove that he had ridden furiously northwards from the station towards Brechin, and that only for a small part of the distance. Complainer had been four times along the road that day. Objection repelled.

The *locus* was sufficiently specified, and there was nothing in the complaint intimating an undertaking on the part of the prosecutor that the suspender was riding either in one direction or the other. The material thing was that he was riding furiously along the road, in whatever direction.

Act.—Scott. Agent—James Nisbet, S.S.C.——Alt.—Adam. Agent—T. G. Murray, Crown Agent.

(Lord Justice-Clerk, Lords Cowan and Jerviswoode.)

H. M. ADV. *v.* JOHN HENRY GREATREX, SEWELL GRIMSHAW, AND THOMAS GRIMSHAW.—*May* 9, 10, 11.

Forging Bank Notes—45 Geo. iii. c. 89—*Sentence*—20 & 21 Vict., c. 3.

The panels were charged with contravention of ss. 1 and 6 of 45 Geo. iii., c. 89 (forgery of bank notes), and with forgery and uttering of forged bank notes at common law. Objection that the 1st sect. of the statute did not apply to the documents alleged in the minor proposition to have been forged, which were there called bank notes, *repelled*, and *held* that the bank notes in question fell under the category of "promissory notes for the payment of money." It was then objected that since the notes referred to in the minor were held to answer to the description of promissory notes in terms of s. 1, they could not be held to be bank notes under s. 6, which referred, moreover, exclusively to Bank of England notes. The charge under s. 6 was withdrawn.

The case having gone to trial, a verdict of guilty was returned. Counsel for prisoners then submitted that only a sentence of imprisonment could be pronounced. The punishment of death imposed by the Act of George III., and that of transportation substituted therefore by 2 & 3 W. IV., c. 123, had both been abolished, and the Act 20 & 21 Vict., c. 3, (Penal Servitude Act), was not libelled upon. Martin, Nov. 16, 1835, 1 Swin. 5; Nellis or Neillus, May 20, 1861, 4 Irv. 50. Objection repelled. Greatrex sentenced to 20 and the Grimshaws to 14 years penal servitude.

Act.—Sol.-Gen. Millar, Brown, A.D.——Alt.—Scott, MacLean, & Brand. Agent—D. Mill, S.S.C.

CIRCUIT COURT OF JUSTICIARY.

(Before Lords Ardmillan and Neaves).

BOOTH *v.* LANG.—Glasgow, *April.*

License for Sale of Spirits—9 Geo. iv., c. 58—25 & 26 Vict., c. 35—*Parliamentary Boundaries.*

Booth, who held a certificate for the sale of excisable liquors granted by Justices of Renfrew, appealed against a sentence in the Southern Police

Court of Glasgow fining him £7 for trafficking in spirits without having a licence from the Magistrates of Glasgow.

It was admitted that his shop was in Renfrewshire, within the Parliamentary limits of Glasgow, and further that the magistrates of Glasgow had jurisdiction to a certain extent in the territory outwith the royalty but within the municipality. The 3rd and 4th secs. of the Home Drummond Act, 9 Geo. iv., c. 58, provided that the Magistrates of Royal burghs should grant certificates within the Royal burgh, and should have no power to give licences for houses occupied without the boundaries of the Royal burghs. The 4th sect. provided that Justices of the Peace should grant such certificates for their several counties, and should have no power to grant certificates in the royalty of any burgh. Sect. 1 of the Public House Amendment Act (25 & 26 Vict., c. 35), under which the complaint was brought, provides that magistrates of burghs shall meet for granting and renewing certificates of exciseable liquors within the bounds of such burghs on the second Tuesday of April and the third Tuesday of October; and the Justices for granting certificates for such sale within the several counties on the third Tuesday of April and last Tuesday of October. Sec. 37 provides that the word burgh shall mean any Royal or Parliamentary Burgh, and the boundaries shall be the same as those within which the magistrates have jurisdiction in matters of police. The appellant contended that this clause had not the effect of conferring upon the magistrates of burghs exclusive jurisdiction; it was not said that in the territory the magistrates were to have the same jurisdiction they had in the royalty; nor did it take away the previously understood jurisdiction which it allowed to the Justices of the county. The Home Drummond Act indeed was prior to the distinction of royal and parliamentary burghs, and whatever the effect of the 25th and 26th Vict. may be, it does not take away the previously acknowledged jurisdiction of the Justices of Renfrew. A jurisdiction once conferred cannot be taken away by implication. At least there was a double jurisdiction.

The Court held that there was no double commission for issuing these licenses in the counties by both city magistrates and justices of the counties. There was no doubt that this was a bad license. Appeal refused.

Act.—Brand.——Alt.—R. V. Campbell.

Alexander v. Begg.

Small Debt Court—Competency—Arrestment—Discharge.

Appeal from Small Debt Court, Lanark, in an action of furthcoming. The appt., as trustee on the affairs of Dunlop, realised the estate, and distributed it amongst the creditors. On 29th Sept. 1866, the whole affairs of the trust were brought to a conclusion, and Dunlop granted a discharge. In Jan. 1867, Begg, who claimed to be a creditor of Dunlop, brought an action against him in the Small Debt Court for £12, and arrested in the hands of Alexander. Begg obtained decreet, and brought an action of furthcoming, in which he obtained decree against Alexander for £10, the Sheriff holding that there had been unnecessary litigation under the trust, and that the cost of it, amounting to about £14, ought still to be considered as in the hands of the trustee, for behoof of the respt. The appt. appealed on the ground that the Sheriff had gone behind a regularly executed discharge, which it was incompetent for him, without reduction, to do.

Lord ARDMILLAN—If you arrested when there was nothing due to Dunlop by Alexander, your arrestment was of no avail, for there were no funds.

The Court sustained the objection to the competency in *hoc statu*, and remitted to the Sheriff to hear parties further, with a recommendation to send the case to the ordinary roll, reserving for the Sheriff the question of expenses.

Act.—MacLean.——Alt.—R. V. Campbell.

MARGARET FALLON.—Perth, *8th April* 1867.

(Before Lords Justice-Clerk and Deas.)

49 *Geo. III., c.* 49—*Birth at the Full Time.*

Panel was charged with concealment of pregnancy. Two medical reports were libelled on, but no medical witnesses were cited. The only evidence to prove that the child born had reached its full time was that of a midwife who examined the body the day after birth. In her declaration the panel, who was in service, stated that when she had given birth to the child she had not reached the full time, and intended to go home to her father's house to be delivered. Lord Deas said he had never seen a case in which medical evidence had not been led to prove birth at the full time, and directed the jury to return a verdict of not proven.

Act.—Adam, A.D.——Alt.—Brand.

HANNAH M'ATAMNEY AND JOHN M'ATAMNEY.—Dundee, *6th April*, 1867.

(Before Lords Justice-Clerk and Deas.)

Relevancy Indictment—Fire-raising—Adjournment of Diet.

Wilful fire-raising with intent to defraud insurance companies. The insurances were effected by the female prisoner's deceased husband. The fire was said to have been applied to furniture and stock-in-trade belonging to the female prisoner in a shop occupied by her with the intent to defraud the companies by recovering "the sums insured with them respectively as aforesaid under the said policies of insurance a part thereof on the false pretence that the fire so raised was accidental. Objection that no interest of the male prisoner in the policies was set forth, and that there was no averment that he could recover the sums on the policies sustained.

Motion by the A. D. for leave to adjourn the diet as to the female prisoner, refused on the ground of hardship, she having been in prison since Dec. last, and having counsel, agents, and witnesses present. The case went to trial. Not proven.

Act.—Adam, A.D.——Alt.—Mair, Reid.

ENGLISH CASES.

INTERNATIONAL COPYRIGHT.—By sec. 6 of the International Copyright Act, 7 Vict. c. 12 (which incorporates the English Copyright Act, 5 & 6 Vict. c. 45), no author of any musical composition is entitled to the benefit of the Act unless he registers within a prescribed time at Stationers' Hall the name and place of abode of the proprietor of the copyright, and the time and place of the first publication

abroad. By sec. 13 of the English Act, every registered proprietor of copyright may assign his interest, by entry in the register-book at Stationers' Hall, of the name and place of abode of the assignee in the form given in the schedule. In the form given in the schedule the names only, and not the addresses of the assignor and assignee, are given. By sec. 24, no proprietor of a copyright is to maintain an action unless the copyright has been duly registered. Plaintiff sued as assignee of the copyright in different works. One of these was the pianoforte score of an opera, which was registered: "Title of work, 'The Merry Wives of Windsor,' composed by Nicolai, pianoforte score; name and abode of author or composer, N., Berlin." It was proved that although N. was author of the opera, the pianoforte score was composed by B:—*Held*, that the registration was defective, and that the plaintiff had therefore failed to make out his title, as the pianoforte score was a production requiring independent knowledge and skill on the part of the composer, whose name ought to have been entered in the register-book.—The assignee of an opera was described in an entry in the register-book as "G. W.," without any other description:—*Semble*—That this entry, though defective, would not prevent the assignee from maintaining an action if the original entry of proprietorship were good, and a private assignment proved.—In registering a musical composition under the two statutes, the time of first publication was given merely as "1850":—*Semble*, per *Blackburn*, *J.*, that this was insufficient, and that the day of the month ought to have been stated.—*Wood* v. *Boosey*, 36 L. J. Q. B. 103.

REWARD FOR APPREHENSION OF THIEF.—A jeweller's shop having been robbed, and watches and other property stolen from it, the jeweller, the defendant, offered by a handbill a reward in these terms:—"A reward of £250 will be given to any person who will give such information as shall lead to the apprehension and conviction of the thief or thieves," &c. The handbill described the watches, &c. Shortly after one R. brought a watch to plaintiff a watchmaker, and left it to be repaired, saying he had another which he wished to sell. Plaintiff recognised the watch as one of those described in the handbill and gave information to the police, who went to his shop and apprehended R. with another of the stolen watches in his possession. R., while in custody gave information to the police that the burglars were to be found at an eel pie shop in Whitechapel Road. Two persons were in consequence apprehended there with a quantity of the stolen property in their possession, and were afterwards tried and convicted for the robbery, R. being at the same time convicted of feloniously receiving the two watches knowing them to be stolen. The plaintiff having brought his action for the reward obtained a verdict. A rule being obtained for a new trial on the ground that the judge ought to have told the jury that the evidence was too remote, as there was nothing to show that the information was given by R. was given at the instance of the plaintiff, or so as to entitle the plaintiff to say that he supplied the information which led to the conviction and apprehension of the thieves. Rule discharged by Court of Q. B. and held on appeal that this judgment was right.—*Tarner* v. *Walker*, *Ex. Cham.*, 36 L. J., Q. 121 B.

PRINCIPAL AND AGENT—*Rules of Stock Exchange.*—If A employ B to buy shares in a Joint-Stock Company, according to the rules of the Stock Exchange, for a certain account day, and B, in accordance with such rules, pay for and take a transfer of shares on that day, A is bound to repay B the amount so paid, although before such account day the said company is being wound up within the meaning of 25 & 26 Vict. c. 89, sec. 153, which enacts that every transfer of shares shall then be void unless the Court otherwise order.—*Whitehead* v. *Izod*, 36 L.J., Q.B. 113.

SHIPPING—*General Average.*—A clipper sailing ship, fitted with an auxiliary screw, being on her voyage from Melbourne to England, came into collision with an iceberg, and received such damage that her sailing power was practically destroyed. By means of her screw and steam-power she reached Rio. The expense of repairing her at Rio would have been so great that the master properly determined to have her temporarily repaired, so as to bring her home under steam. It

was necessary for this purpose to purchase coals at Rio and at Fayal, and the ship eventually reached home. Defendants were owners of a quantity of gold on board the ship, and the shipowner sued them to recover the contribution to general average alleged to be due from them in respect of the expense incurred in obtaining coals at Rio and at Fayal:—*Held*, that the action was not maintainable, as there was no right to charge this expense to general average. *Per Curiam.*—"The shipowners, by their contract with the freighters, are bound to give the services of their crew and their ship, and to make all disbursements necessary for this purpose. In the case of such a vessel as this, which is equipped with an auxiliary screw, their contract includes the use of that screw, and consequently the disbursement necessary for fuel for the steam-engine. Now the disaster which occurred in this case no doubt caused the engine to be used to a much greater extent than would generally occur on such a voyage, and so caused the disbursements for coals to be extraordinarily heavy; but it did not render it an extraordinary disbursement. The case is similar to that of an ordinary sailing vessel, in which, owing to disasters, the voyage is unusually protracted, and consequently the owner's disbursements for provisions and the wages of his crew are extraordinarily heavy. It is not similar to that of the master hiring extra hands to pump when his crew are unable to keep the vessel afloat, or any other expenditure which is not only extraordinary in its amount, but is incurred to procure some service extraordinary in its nature"—(Note for Reference, Tudor's L.C. in Mere-Law, 74; 2 Arnold on Mar. Ins., 3d ed. 772, 778; *Berkley* v. *Presgrave*, 1 East 219; *Hallet* v. *Wigram*, 9 C.B. 580, 19 L.J. (N.S.), C.P. (281). *Wilson* v. *Bank of Victoria*, 36 L.J., Q.B. 89.

PRINCIPAL AND AGENT—*Promoters of Company.*—Plaintiff and defendants were desirous of starting a company, to take plaintiff's premises and stock-in-trade. Plaintiff made a written proposal for the sale of his extra stock, and defendants sent plaintiff a written acceptance thereof; the proposal was directed to and accepted by defendants "on behalf of the proposed G. R. A. H. Co (Lim.)." The company was not then in existence. Plaintiff brought his action on this agreement:—*Held*, that as the company was non-existent at the time of the agreement, defendants were personally liable, and that parol evidence was inadmissible to shew a contrary intention. *Kelner* v. *Baxter*, 36 L. J., C. P. 94.

PERJURY—*Affidavit.*—By sec. 52 of 55 Geo. III. c. 184, affidavits required by that or any former or future act to be made for the satisfaction of the Commissioners of Stamps, "shall in all cases not otherwise expressly provided for" be made before such Commissioners or certain other specified persons, of whom a Justice of the Peace is not one. By sect 7 of 9 Geo. IV., c. 23, "any Justice of the Peace is empowered to administer" the oath to the "cashier, accountant, or chief clerk" of a bank, for certain affidavits required by the Commisioners of Stamps:—*Held*, that the power in the latter act is cumulative not exclusive, and that the authority to administer the oath given by the earlier act is not taken away by the later act. Any one employed in a bank under the principals to carry on the business of the bank, whether called secretary, manager, accountant, cashier, or by any other name, is a clerk, and if at the head of his department is a "chief clerk" within the meaning of sec. 7 of 9 Geo. IV., c. 23. *R.* v. *Greenland*, 36 L. J., Mag Ca. 37.

PERJURY—*Local Marine Board.*—Wilful and corrupt false swearing before a local marine board, under 17 and 18 Vict, c. 104, upon a matter material to an inquiry then lawfully investigated by them, under 25 & 26 Vict. c. 63 s. 23, is perjury. *R.* v. *Tomlinson*, 36 L. J., Mag. Ca. 41.

SPECIFIC PERFORMANCE *of an agreement between Railway Company and Landowner.*—A railway company agreed with a landowner to make a bridge and other accommodation works. On the works being commenced in a manner at variance with the agreement, the landowner filed his bill for specific performance, and for an injunction to restrain the completion of the works. The motion for injunction was ordered to stand over until the hearing of the cause, on the company's under-

taking to deal with the works as the Court should direct. Before the hearing of the cause the works were completed, and the railway was opened:—*Held*, per *Chelmsford*, C., rev. dec. of *Romilly*, M.R., that the possible inconvenience to the public was no ground for refusing specific performance; and decree accordingly. *Semble*—The temporary suspension of traffic during the progress of the works, if necessary, would not be sufficient ground for refusing specific performance. *Raphael* v. *the Thames Valley Rail. Co.*, 36 L. J., Ch. 209.

BILLS *drawn on general Letter of Credit.*—A banking company addressed to a firm of merchants a letter of credit as follows:—"No. 394. You are hereby authorized to draw upon this bank, at six months' sight, to the extent of L.15,000 and such drafts I undertake duly to honour on presentation. This credit will remain in force for twelve months from this date, and parties negotiating bills under it are requested to indorse particulars on the back hereof. The bills must specify that they are drawn under credit No. 394 of the 31st of October, 1863." The merchants drew bills under the letter to the amount of L.6000, and sold them to third parties who duly indorsed particulars. The bank, on payment of the bills being demanded, set up a cross claim against the merchants:—*Held*, by Lords Justices, rev. dec. of *Wood*, V.C., that the purchasers of the bills had a clear right in equity to recover the amount thereof free from the cross claim. Per *Cairns*, L.J. On the offer in the letter being accepted and acted on by the purchasers of the bills, there was constituted a valid and binding legal contract in their favour against the bank. *In re Agra and Masterman's Bank* (*Lim.*), *ex parte Asiatic Bg. Corp.* (*Lim.*), 36 L.J., Ch. 222.

TRADE-MARK.—Plaintiffs purchased from a firm established in the United States knowledge of a secret mode of making crucibles, which had acquired a reputation in America as "Patent Plumbago Crucibles," although the process never had been patented:—*Held*, per *Wood*, V.C., that plaintiffs could not maintain a bill to restrain others from pirating this designation. *Morgan* v. *M'Adam*, 36 L.J. Ch. 228.

COLLISION—*Compulsory Pilotage.*—A Norwegian vessel, the *Hanna*, bound from Sweden to London, and in charge of a duly licensed pilot, came wrongfully into collision with another vessel off the Nore Light-ship:—*Held*, that there was no compulsion to take the pilot, and that therefore the owners of the *Hanna* were responsible for the damage. At the time of the collision a man was on board the *Hanna*, to whom the master had agreed to give a free passage, and who messed with him and also assisted in working the ship:—*Held*, that the *Hanna* was not "carrying passengers" within the meaning of the statute, so as to render it compulsory to take a pilot, 36 L.J., Adm. 1.

COLLISION.—In a damage cause, brought by the owners of a sailing vessel against a steam vessel, it is not incumbent upon plaintiffs to plead that the sailing vessel, after observing the steam vessel, kept her original course. The burden of proof, and therefore of plea, is on the defendant, to shew that the course of the sailing vessel was altered, and the collision caused thereby. *The West of England*, 36 L.J., Adm. 4.

FREIGHT—LIEN—COSTS.—A ship and cargo were salved on 2nd Oct. and arrested in the salvage suit on 7th Oct. The ship, which was not worth the dock dues, was abandoned to the dock authorities on 24th Oct., and the cargo was, after notice to the owners, sold on 16th Dec.:—*Held*, that the abandonment of the ship by the master was not a repudiation of his contract to carry the goods to their destination; that the owners of cargo, by not procuring its release, waived their right to have it transhipped; and that therefore the owners of the ship were entitled to *pro rata* freight. After payment of salvage and costs, defendant's proctor has against the property salved a lien in priority to average expenses or necessaries incurred since salvage. Although the master has a lien on the ship for average expenses, the ship's agent, if he has paid them, has no such lien. A claim by ship's agent for disbursements cannot be recognized in the Court of Admiralty even against the proceeds of ship or cargo. *The Soblonsten*, 36 L.J., Adm. 5.

AGREEMENT FOR LEASE.—In an agreement for a Lease there is an implied undertaking by the lessor that he has a good right and title to let for the term; and if he has not, he is liable to an action at the instance of the intended lessee.—*Stranks* v. *St. John*, 36 L.J., C.P., 118.

COPYRIGHT—*Engravings Acts: photographic copies.*—Copying a print by photography is within the Copyright in Engravings Act, 17 Geo. 3. c. 57, and the proprietor of such print, who has a copyright therein by 8 Geo. 2. c. 13. and 7 Geo. 3. c. 38. can maintain an action, under 17 Geo. 3. c. 57, against any one who publishes such photographic copy contrary to that statute.

It is a sufficient compliance with the 8 Geo. 2. c. 13, as to printing the proprietor's name on each print, for his name to be on the publication line of the print, without an express statement there that he is such proprietor. And where the statement on the print was, "Published by Henry Graves & Co., May 1, 1861, Printsellers to the Queen, 6 Pall Mall," and it was proved that Henry Graves was, in fact, the sole proprietor, held that the proprietor's name was sufficiently shown. Gambart v. Bell, 14 C.B., N.S. 306; 32 L.J., C.P. 166 affirmed.—*Graves* v. *Ashford*, (Ex. Ch.), 36 L.J., C.P. 239.

MARINE INSURANCE—*Submarine Cable: Total Loss.*—A shareholder in a company formed for laying down a submarine cable between I. and N. caused himself to be insured by a policy in the common form of a marine policy, but containing in addition the following clauses, viz., "The risk to commence at, from and including the time of laying the cable on board the G. E., and to continue till the cable be laid in one continuous length between I. and N., and until 100 words shall have been transmitted from I. to N. and *vice versa*, the risk of this policy then to cease and determine;" and "it is hereby understood and agreed that this policy, in addition to all perils and casualties herein specified, shall cover every risk and contingency attending the conveyance and successful laying of the cable from and including its lading on board the G. E. until 100 words be transmitted from I. to N. and *vice versa;* and it is distinctly declared and agreed that the transmission of the 100 words from I. to N. and *vice versa*, shall be an essential condition of this policy:"—*Held*, that this was an insurance on the entire adventure of laying down the cable successfully in that one particular voyage of the G. E.; and that, the cable having broken when being hauled on board the G. E. after half of it was laid down, the underwriter was liable for a total loss, although the other half of the cable was saved and ready to be used in a subsequent attempt to complete the communication between I. and N. *Wilson* v. *Jones* (Ex. Ch.) 36 L. J. Ex. 78.

CARRIERS BY RAILWAY—*unreasonable condition; [Railway and Canal Traffic Act]*—A condition, in a special contract for carriage of cattle, that the owner shall undertake all risks of loading, unloading, and damage, whether arising from the negligence or default of the company or their servants, or from defect or imperfection in the station, platform, or place of loading and unloading, or the carriage in which they may be loaded or conveyed, or from other cause whatsoever, is unreasonable; and does not cease to be so because, by another condition, the company undertake to grant free passes to persons having the care of live stock, as an inducement to owners to send proper persons with and to take care of them. Such conditions do not relieve the company from their common law duty to keep their station in a safe and proper condition, and to deliver the cattle in a fit and proper place. *Semble*—That the portion of the condition relating to the risks of loading and unloading is not unreasonable; but, *quære*, if it is severable from the portion relating to the risks of carriage? *Rooth v. N. E. Ry. Co.*, 36 L. J. Ex. 83.

BILLS AND NOTES—*post-dated cheque: partnership.* A post-dated cheque, put into circulation with the express intention of its being held over till a subsequent day, is for all practical purposes a bill of exchange; and, therefore, one member of a firm of attorneys cannot bind the firm by drawing a post-dated cheque in the name of the firm without authority for purposes unconnected with the partnership business. So held on the authority of *Hedley* v. *Bainbridge*, 3 Q. B. 316; 11 Q. B. 293. *Forster* v. *Mackreth*, 36 L. J. Ex. 94.

THE

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THE FRENCH BAR.

Continued from April Number of Journal.

We have now traced the history of the French Bar down to its suppression by the Constituent Assembly in 1790; and it is worthy of notice that in that Assembly, where the law for its suppression encountered scarcely any opposition, there were seven members belonging to the Bar of Paris, and the office of President was held by Thouret, an advocate of the Parliament of Rouen. Some authors have endeavoured to explain the silence of these advocates during the discussions preceding the passing of the law which abolished their order, by supposing that they abstained from offering any opposition through an enthusiastic devotion to the glorious traditions and ancient renown of the Bar. Seeing that the suppression of the courts of supreme jurisdiction would place the administration of justice in the hands of a multitude of petty tribunals, and consequently distribute the members of the Bar among a number of inferior courts, they feared that the grandeur and dignity of the order would be impaired, and therefore preferred to submit to its extinction rather than to imperil its honour. It has been also said that the advocates belonging to the Constituent Assembly, having communicated to several members of the Parisian Bar the perplexity they felt as to the line of conduct which they should pursue, the following written opinion—drawn up by M. M. Bonnet and Delacroix-Frainville—was returned to them. "We must be viewed under two aspects. Under that of *Advocates*, and under that of *Advocates to the Parliament*. The dissolution of the Parliament deprives us of the latter. With regard

to the former, it can only continue to be of any value while there shall yet remain supreme courts to which we can transfer our name, our attributes, and our prerogatives; but the new judicial organization leaves no place for such courts. It recognizes nothing but paltry tribunals of first instance which take the place of each other in appeal cases. It will be these courts which will give investiture as advocate. These bars will be furnished with a prodigious number of men who, without any idea of our principles and discipline, will lower and degrade the nobility of our functions. These very men, however, will obstinately arrogate to themselves the name of advocate, will usurp its insignia, will even wish to form an order, and the public, misled by the similarity of name, will confound these advocates got up for the occasion, with those belonging to the old régime. The only means to escape from that dangerous *posterity*, is forthwith to suppress the name and order of advocate and the attributes which belong to it; so that there may be no other advocates from the time that we shall have ceased to exist. Sole depositaries of that noble rank, let us not permit its glory to be tarnished by passing into the hands of those who would sully it; let us not give ourselves unworthy successors. Let us with our own hands exterminate the object of our affections rather than deliver it up to outrages and affronts." In fact, though on better grounds, and from nobler motives, the order of advocates spoke and acted much as Ricci the General of the Jesuits had done some forty years previously, when he preferred the abolition of his order to any alteration of its essential principles, in his famous "*Sint ut sunt aut non sint.*"

Many celebrated lawyers illustrated the Parisian Bar at the period of its suppression. Among these we may mention François Denis Tronchet, the last batonnier elected by the ancient council of the order. He was subsequently one of the defenders of Louis XVI., and narrowly escaped the vengeance of the regicides. He was more distinguished as a consulting than as a pleading advocate. His practice was immense, and nearly 3000 of his opinions still exist, remarkable for brevity, clearness, and profound legal knowledge. Paul Nicolas Henrion de Pansey was another eminent advocate of this stormy period. He wrote a Treatise on Fiefs, Dissertations on Feudal Law, and many other able works. He died in 1829, at the advanced age of 87, occupying the high office of First President of the Court of Cassation. A reply of his to the Emperor Napoleon deserves to be recorded. The Em-

peror asked him why he had never been married? Upon which Henrion promptly responded, "Upon my word, Sire, I have never had time." Ferey was also a learned jurist of the revolution era, distinguished by his untiring industry. He drew up for his own instruction no fewer than 17 folio volumes of notes extracted from different works on law. At a later period, he took a leading part in the preparation of the Civil Code. He died in Paris in 1807. Joseph Delacroix-Frainville was another famous barrister, whose life was prolonged far beyond the revolutionary period. He exercised his profession during forty years, and was for four years President of his order. Shortly before his death—which happened in December 1831—he ordered himself to be carried into his library, declaring that he wished "to die on the field of honour in the midst of his friends." Pierre Nicolas Berryer, himself an eminent pleader, especially in commercial cases, and more famous as the father of the most brilliant orator of the modern French Bar, also belongs to this epoch, as does Louis Ferdinand Bonnet, one of the most amiable and able members of the order. Raymond-Romain de Sèze, born at Bordeaux in 1748, played a prominent part as advocate both during and after the revolutionary period. In 1789, he undertook the cause of the Baron de Bezenval, impeached for having given orders to defend the Bastille, and procured his acquittal, and still more highly distinguished himself by his defence of the unfortunate Louis XVI. He afterwards attained to high honours and preferments, being made First President of the Court of Cassation, Peer of France, and Member of the French Academy. He was remarkable for the length of his opinions, one of which extends to 107 quarto pages. But, perhaps, the greatest advocate of this period was Nicolas-François Bellart, born in 1761, and admitted to the Bar in 1785. He was an intimate friend of Turlin, a young man of good fortune, and a cousin of the celebrated actor Talma. Turlin was fond of assembling around him Bellart and some of his other intimates, who were, like himself, studying for the bar; and on these occasions they used to practice declamation, selecting for their subjects the noble tragedies in which Talma was so great. Bellart thus improved his remarkable natural gifts; and his graceful gestures, sonorous voice, and animated manner, combined with his fine face and person, made the eloquence of his pleadings almost irresistible. He defended many of those proscribed by the revolutionary tribunals; and such was

the effect of his eloquence in the case of Madame de Rohan-Rochefort, that the infamous Fouquier Tinville, who heard him, on the judges retiring to deliberate, threw himself into his arms, bathed in tears, and exclaimed, "My friend, they are monsters if they condemn her!" She, and those accused along with her, were acquitted. He was obliged to give up the bar, at the early age of forty, owing to a spitting of blood. His principal pleadings, which are among the most remarkable that the French bar has produced, have been collected in six volumes. After leaving the bar, he filled various high offices in the magistracy; and, as *procureur général*, he delivered some orations worthy of D'Aguesseau, especially one upon sincerity in the advocate. He several times wished to retire from his arduous and responsible position; and, on one occasion, Louis XVIII. said to him, "You have the misfortune to be *procureur général*, as I have the misfortune to be king. We must both remain at our posts." Bellart died in July 1825. The City of Paris erected a monument to him in the cemetery of Père-Lachaise.

The last famous advocate belonging to this epoch whom we shall mention, was Jean-André Gairal, admitted to the bar in 1787. During forty years he was engaged in a great variety of important causes. One of the most remarkable of these was that of the heirs of de Rusé, which commenced in 1788, was continued down to the suppression of the bar in 1792, was resumed in 1818, and in which, in 1827, Gairal was successful in procuring a decree of the Court of Paris, condemning their debtor to pay them about £60,000.

The advocates belonging to this period, of whom we have hitherto spoken, were distinguished more by their professional excellence than by their political ability and influence. But the case was exactly opposite with Barnave and Vergniaud, on whose bright and brief careers we propose to dwell for a little. Barnave was the child of Protestant parents, and was born at Grenoble, in the province of Dauphiné, in 1761. His father was a lawyer in good practice, belonging to the citizen class, and his mother was handsome, and of noble birth. An affront offered to her by the Duc de Tonerre, governor of the province, first inspired the young Barnave with the determination "to raise the caste to which he belonged from the state of humiliation to which it seemed condemned." He early displayed the impatience of injustice and oppression, the clear insight, the fondness for reading and reflec-

tion, and the firmness of character for which he was afterwards conspicuous. But he also shewed great tenderness of heart and attachment to his family; and at sixteen fought a duel in defence of a younger brother, in which he was severely wounded. In person and countenance he was graceful and handsome, with fair hair, and blue eyes. He had a strong predilection for literature, but applied himself vigorously to the study of law, in deference to the wishes of his father, at the same time mixing up with it an attentive examination of all the works he could find on the subject of government and institutions; thus preparing himself for the political life on which he was so soon to enter. His remarkable talents were early appreciated; and, in 1783, when only twenty-two, he was chosen by his brethren of the bar of Grenoble to pronounce the discourse at the closing of Parliament. He selected for his subject the necessity of the division of powers in the body politic, and acquitted himself so well that he was universally applauded, and at once placed in the highest position among the youth of his native province. At twenty-seven he was chosen, along with the veteran Mounier, to represent Dauphiné in the States-General. There he soon made himself remarked by the clearness, facility, and vigorous reasoning of his oratory. In spite of his youth he speedily acquired weight and authority, took a leading part in all the most important discussions; and, in the Constituent Assembly, several times ventured, not unsuccessfully, to measure himself with Mirabeau. He was ardently attached to liberty; but was, at the same time, a friend to monarchical government, which he believed to be best suited to France. With his usual penetration he soon perceived the real state of parties, and the true nature of the great movement that was agitating the country in 1789, and the utter impossibility of arresting it by the half measures which his colleague Mounier and his followers wished to employ. "Mounier and his partizans," he said, "seemed not to have perceived that there was a revolution; they wished to construct the edifice with the materials which had just been broken down." He found three systems contending for the mastery. The first wished to regenerate the monarchical power by changing the sovereign; this was the secret wish of the Orleans party. The second aimed at substituting a republican government for monarchy. While the third had for its object to preserve both the throne and the sovereign; and, at the same time, to recast and renew all the other parts of the government.

To this last party Barnave at once attached himself, and remained, during his short political career, its consistent and unflinching supporter. During the stormy debates that often took place in the Assembly, and gave rise to a number of personal quarrels, he got involved in a duel, which, however, terminated without bloodshed. A deputy named Cazalés had exclaimed, looking pointedly at Barnave, that all the members of the left were brigands; and, on Barnave's inquiring his meaning, he told him that the insult was specially levelled at him. Next day a meeting took place in the Bois de Boulogne, Barnave being seconded by Lameth, and Cazalés by Saint-Simon. Barnave fired first, and missed; and Cazalés' pistol twice hung fire. "I beg you will excuse me," politely exclaimed Cazalés." "I am here to wait your pleasure," returned Barnave. During the time the seconds were re-charging the pistols, the two antagonists conversed with the utmost coolness. "I should be heartbroken to kill you," said Cazalés; "but you give us a great deal of annoyance. I should only like to keep you out of the tribune for some time." "I am more generous," retorted Barnave, "I desire scarcely to touch you, for you are the only orator on your side of the house; whilst on mine, they would scarcely notice my absence." At the second fire the bullet of Barnave struck Cazalés on the forehead, but merely inflicted a severe contusion, the rim of his hat having deadened the blow. In the autumn of 1790 Barnave was appointed President of the Assembly, and was subsequently sent, along with La Tour-Maubourg, and Pétion, to bring back the King and Queen from Varennes, where their flight from France had been arrested. Throughout the journey, he conducted himself like a man of honour and feeling towards the unfortunate Queen; and by so doing prepared the way for his own arrest and condemnation at no distant date. He clearly perceived the fatal error committed by the Constituent Assembly in resolving that none of its members should form part of the approaching legislature—an error which in reality reopened and perpetuated the revolution, while declaring it at an end; and how truly he estimated the character of the moderate party, to which he belonged, may be seen from the following remarkable passage in his memoirs. "The moderate party," he says, "which, both in numbers and composition, should be regarded as the nation itself, has scarcely any influence; it throws itself, indeed, as a make-weight on the side which seeks to moderate the revolution, but it scarcely dares to give public utterance

to its wishes. When events which it has the most dreaded are consummated, it endorses them. It abandons its former chiefs, and its former principles, and seeks only, in its new career, still to form the rear-guard, and to retard the march of the revolutionary column, in whose train it is dragged along in spite of itself. This party has, always, coward-like, abandoned its leaders, whilst the aristocratic and popular party have always supported theirs. All that we can expect from it, in general, are secret good wishes and some applause when one has conquered for it, a feeble support in success, no resources in defeat, no hope of vengeance. In this revolution it has never possessed any energy, unity, or talent for attack." On the dissolution of the Constituent Assembly, Barnave returned to his home at Grenoble, where we find him, in spite of his sense of the errors and crimes of the revolution, giving the following eloquent testimony to the good it had wrought. "What a vast space traversed in these three years, and without our being able to flatter ourselves that we have arrived at the end of our journey! We have dug very deep, we have found a new and fertile soil; but what an amount of corrupt exhalations has it sent forth! How much public spirit in individuals, how much courage in the mass; but how very little of real character, of calm force, and especially of true virtue! Arrived at my home, I ask myself if it would not have been as well never to have left it; and I have need of a little reflection to answer, so much does the position in which this new Assembly has placed us abate the courage and energy. However, when I consider a little, I am convinced that, whatever happens, we cannot cease to be free, and that the principal abuses which we have destroyed will never reappear. How many misfortunes should we undergo to make us forget such great advantages!" Soon after his return home, Barnave was arrested on a charge of correspondence with the royal family, detained for a year in captivity in Dauphiné, brought to Paris on 3d March 1793, and beheaded on the 30th of the same month. He was only thirty-two when he died, and his political career had lasted little more than four years. Barnave's greatest oratorical success in the Constituent Assembly was his speech on the question of the inviolability of the royal person, in which he displayed admirable eloquence, and just and exalted political views. He uncompromisingly maintained the doctrine of the inviolability and irresponsibility of a constitutional king, and endeavoured to throw around the unfortunate monarch the protection of the

mantle of the law; and, in spite of the distastefulness of his theory to many of his hearers, he maintained it with a largeness of view, a dignity, and a fervour that drew down almost universal applause. Madame de Staël said of him that his eloquence resembled that of the best English models, from its close and vigorous reasoning, its appeal to the judgment rather than the passions; and an eminent French critic of a more recent date affirms, "If we would name at a distance, among the men of that great Assembly, the orator who would represent it most faithfully from its first to its last day, in its continuity and consistency of character, in its capacity, in its splendour, in its faults, in its integrity also, and in the work of its healthful majority, it would be neither Mirabeau, too great, too corrupt, too soon elevated to power, that we would choose, nor Maury, the Mirabeau of the minority, nor La Fayette not sufficiently eloquent, nor others; it would be, for the combination of qualities which best express the physiognomy of the Constituent Assembly, that young deputy of Dauphiné, Barnave."

Vergniaud, like Barnave, belonged to a provincial Bar—that of Bordeaux—and his brilliant public career was even shorter than that of the great statesman and orator of Grenoble, scarcely extending over four years—for the revolution, like Saturn, was fond of devouring its own children. His fame as an advocate stood high before he entered upon the dangerous arena of the public life of the revolution; but the splendour of his eloquence and the ascendancy of his position in the National and Legislative Assemblies has entirely eclipsed his professional reputation, and procured for him the fame of being, with the exceptions of Mirabeau and Barnave, the greatest orator of the revolution. Unfortunately, however, in spite of his eloquence, patriotism, and disinterestedness, Vergniaud was wanting in political foresight and in decision of purpose, and no man did more than he to widen the breach between the throne and the people, to place the supreme power in the hands of the lowest and most brutal of the populace, and thus to prepare the way for the reign of terror. He permitted the Jacobins to gain power when he might have crushed or disarmed them. He advocated extreme councils until it was too late to fall back upon moderate measures, and—like the magician's servant in the story—called forth a spirit which he could not control, and which finally tore him to pieces. The reign of terror claimed him as one of its earliest and most illustrious victims, and his premature death on the scaffold in the flower of his days

and the height of his faculties, was a bitter expiation of his errors of judgment and vacillation of purpose. Yet it cannot be forgotten that the most eloquent voice in France was raised to ensure and precipitate the fall of the monarchy; to enforce the utmost severities against the emigrés; to bring Lessent, the minister of Louis XVI. to the scaffold; to justify the cowardly assassins of Avignon; to persecute the priesthood; to vote for the death of the king. But while admitting Vergniaud's want of political prudence and foresight, the purity of his motives and the sincerity of his convictions must at the same time, be fully granted. The following brief extracts from some of his speeches on memorable occasions may give a slight idea of the brilliant character of his eloquence. The first is from the speech against Lessent on 10th March 1792. Stretching out his hand and pointing towards the Tuileries the orator exclaimed: "From this tribune from which I address you, I behold the palace where perverse counsellors mislead and deceive the king whom the constitution has given us, forge the fetters with which they wish to enchain us, and prepare the schemes which would deliver us up to the house of Austria! I behold the windows of the palace where they concert the counter-revolution, where they contrive the means of replunging us into the horrors of slavery, after having made us pass through all the disorders of anarchy and all the furies of civil war! The day has come when you can put a stop to such audacity! Consternation and terror have often gone forth in ancient times from that famous palace, let them return to it today in the name of the law!" The second extract which we shall give is from a speech in which Vergniaud boldly and nobly, at the risk of his life, denounced the horrible massacres of September, in which the Parisian mob had murdered by hundreds the prisoners in the different prisons of the city. His eyes had at last been opened by these hideous butcheries. But his illusions were dispelled too late. The power of the Jacobins was confirmed. But the day after the night of these massacres he thus boldly denounced them in the Assembly. "The blinded Parisians dare to say that they are free! Ah! they are no longer the slaves, it is true, of crowned tyrants, but they are the slaves of the vilest of men, the most detestable of scoundrels. It is time to break these shameful chains, to crush this new tyranny! It is time that those who have made good men tremble, should be made to tremble in their turn. I am not ignorant that they have daggers

at their bidding; but, I take you to witness, that my voice shall thunder with all the force it possesses against such crimes and such tyrants! What care I for daggers and assassins! What matters life to the representatives of the nation, when the question regards the safety of the people?"

Two other deputies from the Gironde, Guadet and Gensonné, were distinguished members of the French Bar, and about the same age as Vergniaud—thirty-six—when they were called, like him, to take an active part in political life. The various qualities of their eloquence have been happily characterised by an eminent advocate of the present day. "Guadet, an impassioned orator, supported with impetuous vehemence extreme opinions; he spoke extempore with remarkable facility, and excelled in dealing the most terrible blows to his antagonists. Always ready, he threw himself boldly into the tribune, and there displayed the inexhaustible resources of his fertile intellect. As calm as Guadet was impetuous, Gensonné, austere and grave, possessed no seductive qualities; but, endowed with an accurate judgment, he understood how to state the subject under discussion in the most powerful manner and in the fewest words, and if he was unable to captivate his hearers by the charms of his eloquence, he at least understood how to convince them by the force of his reasoning. Vergniaud united the impetuous eloquence of the first to the inflexible logic of the second, and excelled both by the elevation of his thoughts and the sustained dignity of his language. The most accomplished orator of the Gironde, he belonged to that rare class of men who have no need gradually to grow to greatness in an assembly, but who, by a single bound, spring into the first rank and there maintain themselves without an effort."

Another great man belonging to the Bar of the ancient Parliament, and a prominent figure in the revolution, was Boissy d'Anglas, born at St Jean Chantre in 1756, and died at Paris in 1826. He is indeed better known as a writer, a magistrate, and a statesman, than as a lawyer; but, as he was admitted, when a young man, advocate to the Parliament of Paris, we are entitled to rank him among the celebrities of the Bar, which we are the better pleased to do, as his was not only a useful, consistent, and successful life, but was also illustrated by one of the most splendid examples of civil courage recorded in the annals of history. In the revolutionary assemblies Boissy d' Anglas was distinguished for moderation, firmness, and application to business. In his

speech on the punishment of Louis XVI., he said: "I reject the opinion of those who would put Louis to death; I vote that Louis be detained in a secure place until peace and the recognition of the republic by all the powers, allow of his banishment from France." He had no part in the reign of terror; but yielded to the solicitations of Tallien and Barrère, and joined them in order to procure the overthrow of Robespierre. His adhesion had a powerful effect in deciding the result of the struggle. But the most glorious day in the life of Boissy d'Anglas was the 25th of May 1795, when the mob of Paris, recruited by the thieves, murderers, and evil-disposed persons of the capital, burst into the hall where the National Convention was sitting. The rabble were armed and furious, and many women were to be found in their ranks. They uttered the most savage threats, and soon compelled Vernier, who was sitting as President when they entered, to leave the chair. He was succeeded by André Dumont, who was also speedily forced to retreat, terrified by the fury of the mob, who seemed bent on bloodshed. Boissy d'Anglas, whose firmness of character was well known, and who had previously given many proofs of courage and devotion, was then appealed to by his panic-struck colleagues. He responded to the call, seated himself in the President's chair, and assumed his hat. The exasperated rabble menaced him with instant death, brandished swords over his head, and pointed muskets and pistols at his breast, but still he kept his place and showed no signs of alarm. The deputy Kervelegan was seized before his eyes, and despatched by repeated sabre strokes close to the tribune. His colleague Feraud was also murdered, and his head, cut off and stuck on the point of a pike, was carried round the hall and at last brought to a stand before the President's chair. Then Boissy d'Anglas, who had hitherto sat calm and immoveable in the midst of the tumult, rose from his seat, took off his hat, and reverently saluted the head of the murdered deputy. But neither the ferocious threats of the infuriated mob, nor the bloody weapons pointed at his breast, could drive him to forsake his post, and his heroic firmness prevented his terrified colleagues from deserting the hall of the Convention. Even over the rabble, drunk with excitement and maddened by the taste of blood, his unshaken calmness and contempt of death exercised a controlling influence, and he maintained his place uninjured until the evening, when the approach of some troops terrified the mob and induced them to disperse,

leaving the Convention to proceed with its deliberations at 11 o'clock at night. It was the most glorious day of Boissy d'Anglas' useful and busy life. Next morning, when he entered the Convention, he was greeted with enthusiastic shouts of applause, and was solemnly thanked in the name of his country. This famous scene has since been a favourite theme with French historical painters. It has been depicted by Delacroix, Vinchon, Court, and other well known artists. We have seen M. Court's picture—a highly dramatic and powerful work on a large scale. It is the property, we believe, of the French government. In it, the moment is selected when Boissy d'Anglas is in the act of saluting the head of the murdered Feraud. He is represented as a stately figure with a noble head, with dark hair, and an olive complexion, not unlike the portraits of the great Napoleon.

After the passing of the laws abolishing their order, the former advocates endeavoured to maintain some bond of union among themselves, in hopes of better times. But of the 600 names on the roll in 1789, many gave up the profession; about 46 accepted of some of the newly constituted judicial appointments; and some were elected members of the National Assembly, among whom were Tronchet, Target, Camus, Martineau, Hutteau, Sanson, and Treilhard. There remained about 150, who, while accepting the new designation of *hommes de loi*, were yet united into a sort of voluntary association, preserving the ancient customs and discipline. They carefully avoided mixing themselves up with the intruders, without talent, and often without morality, who came forward to practise before the new tribunals. Among the most distinguished in this group of former advocates we find the names of Delamalle, Bellart, Berryer, Billecoq, Delacroix-Frainville, Gairal, and Gicquel.

We have spoken of the new courts created by the revolutionary assemblies, and shall now proceed briefly to consider their nature and constitution. The administration of civil justice was regulated by the law of August 1790, which entirely altered the existing judicial organization. It admitted arbitration as the chief means of deciding civil suits. Every citizen had the right to plead his own cause. Justices of peace were established, and also judges in the first instance, who, in appeal cases, became judges of the decisions of each other. The law also created Courts of Police and of Commerce. The revolutionary legislators likewise occupied themselves with the administration of criminal justice; and, in

some respects, made important improvements. In October 1789, a decree of the National Assembly established the freedom and publicity of the defence of accused persons; and, in the following year, measures were taken for the preparation of a law for instituting and regulating trial by jury. The constitution of 3d September 1791 established jury trial in criminal cases, and appointed a supreme national court charged with taking cognizance of the crimes and offences of the officers of the state, which was, however, soon afterwards abolished. The decree of 16th and 29th Sept. 1791, contains a code of criminal jurisprudence, whereby the great principles of public order and of respect for the persons and property of citizens, are protected by an entirely new body of laws. These, indeed, were susceptible of material improvements; but they bear the stamp of remarkable wisdom and moderation. They regulate the steps necessary for bringing an accused before the tribunals, and create juries of accusation charged with deciding whether the case should be brought to trial, trace the rules of procedure before the criminal tribunal, establish the publicity and liberty of defence, and finally accord to those condemned the power of appeal in cassation for any infraction of the law. A subsequent decree abolished the torture, the extension of capital punishment to a great number of offences, secret procedure, the absence of defenders, and other monstrous abuses that had disgraced the ancient administration of criminal justice. And here it is worth remarking that that atrocious old system had not even the excuse of being produced in barbarous times. Under the earlier kings of France, crimes might be compounded for by pecuniary penalties. The laws of Saint Louis make careful provision for the defence of the accused, and—as we have before noticed—even in judicial combats, the presence of advocates was necessary to watch over the regularity of the forms. It was not until the comparatively enlightened period of the 16th century, that Francis the First increased the severity of punishments and prohibited the defence of the accused; and from that time down to the revolution, parliaments and magistrates had shown a strange eagerness to maintain, and even to increase, the severity of the provisions of this system of cruelty and injustice. Bourdin, procureur-général, demanded still more rigorous punishments than those contained in the laws of Villers-Cotterets; under Louis XIV., when the subject was under discussion, Pussort, a councillor of state, also argued in defence of these barbarous laws; and, in

1785, the Advocate-General Seguier and the parliament supported them with all their might. The laws of 1789-90, and 1791, which swept away this savage and superannuated legislation, are among the glories of the revolution, and serve to balance, to some extent, its subsequent excesses and crimes.

PROMOTION AT THE BAR.

THE position of Scotch leading counsel in appeals in the House of Lords has more than once been the subject of discussion, and even the occasion of collision with the bar of England. The relative rank of the Lord Advocate and Attorney-General was only fixed in 1834, and that of the Dean of Faculty is still unsettled, even the present distinguished holder of that office being allowed to lead English Q. C.'s only under protest. But the question has lately been raised in a somewhat new form. Until a few years ago the position of the law officers of the Crown in Scotland, on their ceasing to hold office, was anomalous in the extreme. In consequence of this fortuitous circumstance they ceased to lead by virtue of their official rank, and were obliged to yield (except where special concession was made) to the ordinary rule of seniority. In 1858, by resolution of the Faculty, they were allowed to retain a certain precedence acquired by their tenure of office, taking rank of course after the Lord-Advocate, Dean of Faculty, and Solicitor-General. This arrangement, however, could not be binding except on the bar of Scotland. It is a mere bye-law or enactment of the Faculty of Advocates, those in whose favour it was passed wear no insignia of the rank accorded to them by their brethren, and have no right to speak from within the bar. Accordingly, in appeals from Scotland, Queen's Counsel assert their right to take precedence of an ex-Lord-Advocate or ex-Solicitor-General; and we have, during the present session of Parliament, been very nearly witnessing the ex-Solicitor-General of Scotland appearing at the bar of the House of Lords led by English Q.C.'s of greatly inferior standing. This humiliating spectacle has only been averted, we understand, in one or two cases, by the firmness of the agents concerned, who insisted that the counsel in whom they had confidence, and whom they had retained for the purpose, should be allowed to do the work. It is natural, therefore, that this subject should have been much discussed of late, and that propositions for removing the evils complained of should have been brought forward. There can be no doubt that the profession in Scotland will only be asserting its own rights, and following out to its necessary consequence what was done in 1858, if they ask the Queen to give her law officers, with their commissions,

and as part of them, the right to wear silk, and speak from within the bar after, as well as during, their tenure of office. Whether advantage should be taken of this opportunity to define the position of the Dean of Faculty in the Appellate Court is another question; but we think that there should be no difficulty in doing so, and that the just claim of the Scotch bar to have an imperial recognition of the rank of their leader ought to meet with no opposition from any quarter.

But a suggestion has been made of a vastly wider scope, and more questionable character. It has been proposed to introduce the marked distinction which exists in England and Ireland between senior and junior counsel by asking the Queen to confer patents of precedence on selected members of the bar; in other words to make them Queen's Counsel. It is supposed that, besides assuring to several men who are well entitled to lead any English Q.C. (except perhaps two) their fit place in appeals in the House of Lords, this innovation would in various ways have a beneficial effect within the limits of the Scottish Courts. It would, it is said, clearly mark off senior counsel and prevent them from taking work which should properly fall to juniors. It would benefit the junior bar by introducing a rigid rule of etiquette forbidding a leading counsel to write pleadings, or act alone in a cause; and it would greatly benefit some deserving counsel whose business has fallen off, because, while they are not themselves in the habit of leading, they are precluded by the ordinary etiquette from acting under men in senior practice who are their juniors at the bar. We are not disposed to deny that in some, though not in a considerable number of individual cases, some benefit might be derived from an organized system of promotion such as exists in England and Ireland. But we would not for the sake of a few men give up the far greater public advantages which flow from free competition, and still more would we deprecate the introduction of a "mock dignity," as the Q. C. ship has been styled in England, which would sooner or later, probably from the very first, be degraded into a machine for manufacturing political influence, and which would inevitably, with whatever affectation of conscientiousness the patronage might be bestowed, engender infinite jealousies and heartburnings among men who have hitherto dwelt together in unity as much as it is in human nature to do so. The experience of the English bar teaches us what the result would be. Indeed, but for the abuses of this system in England we should never have heard of the proposal to ticket our senior counsel with silk gowns. In 1799 there were but fifteen Queen's counsel, and the occasions were necessarily much less frequent on which these were engaged in the same appeal with Scotch advocates than now, when the number of silk gowns is 153. The present condition of the English bar indeed is a warning to those who fancy that all abuses will be prevented, and only the advantages of the system be felt, merely by fixing a numerical limit to the number of silks which the crown may competently grant. No such limit

would be long observed (even if it could be fixed consistently with the prerogative of the Crown), and a few years hence we should have the same political corruption in the Parliament House which now exists in the distribution of silks in the sister country. The English system of promotion is now, as Englishmen themselves describe it (L. T. vol. 38, p. 4), a mere device by which political support is made the condition of professional advancement, for a change of government means not only a new Premier, Chancellor, and Attorney-General, but a new batch of Queen's Counsel. And what does professional advancement of this kind mean? It implies higher fees; a share in the government of the Inns of Court, for every Q.C. becomes a bencher; in the case of a man of any ability a share in the leading business in the Courts, for Q.C.s are emphatically leaders; the possession of what popular opinion regards as a prize in the profession, and what is undoubtedly a stepping-stone to higher positions. A man's professional prospects, at a certain stage of his career, are often made or marred by the manner in which this patronage of the Crown is exercised. We have before us a tract by Mr Edward Webster of Lincoln's Inn, read before the Juridical Society of London, and published by them in their "Papers," (vol. ii.,) and which was also published separately (London, Draper, 1861). This able paper exposes the various evils which have accompanied the departure from the principle of free competition, and the loss of the liberties of the bar in England, and it points out in particular that to which we now refer:—

"The present system of promotion frequently operates so as to cause unavoidable damage as regards a barrister's professional income, since not to advance at the bar is to retrograde, and although it may be alleged that this would be true were there no division, yet there is this great distinction, viz., that whereas, if the bar were one body, the barrister would alone be responsible for any diminution of his employment; under the present system of two bars he is not so, because he may be, and ofttimes is, prevented handling the instrument necessary for his advance, whilst it is put into the hands of his rivals, it may be not a whit better entitled to it than himself. The barrister, however, has no right to complain if the system be the best for the State; indeed, he cannot, without covering himself with ridicule, complain, in so far as his position is occasioned solely by himself. He enters the profession in common with other men. The same instruments are within his power, and the start in the professional race is fair and open to every competitor. Some have, indeed, when starting the aid of a friendly solicitor, and doubtless, the absence of this support has, it may not be unfrequently, made the profession hopeless. Such instances of failure are, however, we believe, though not very rare, exceptional. Moreover, early in his career the young barrister, if he should perceive his prospects at the bar likely to disappoint him, may betake himself to some other calling; but in the more advanced stage of his profession, when the rank and privileges of the inner bar become under the present system necessary to secure an increasing and to prevent a decreasing professional income, if the barrister be denied this advancement from some unknown cause, it may be an entirely mistaken estimate of his powers, his condition is such that unless the system causing this unmerited injury compensates the State by producing some great public good, it ought not to be allowed to continue. . . . .

"There is no principle or rule by which promotion conferring exclusive forensic privileges can be made, which on investigation does not prove to be unsatisfactory, which in its operation is not either erroneous, or unjust, or corrupt, or arbitrary. The advancement to the inner bar has, it would seem, apparently been given as a "douceur"—on the abolition of Doctors' Commons—it has been conferred, apparently, as the reward for political fidelity;—it has, apparently, been conceded to the

owners of great wealth on account of their wealth; even the sentiments of certain religious bodies, not belonging to the State Church, appear to have been regarded as a material element when granting it. In fine, it is an honour given apparently, or in fact, not infrequently on grounds extra-forensic, save that the recipient must have been called to the bar by his Inn of Court under customs in name educational, but in truth requiring no compulsory legal education whatever."

We are altogether unable to see why the crown should step in at a particular period of an advocate's career, and forbid the public to intrust him with certain kinds of business. The presumption is in every case in favour of free trade, and the onus lies on those who ask for the change to show that the bar and the public will profit by it.* In Scotland there are special reasons for not rashly introducing a new measure such as this. Many members of the junior bar are prepossessed in its favour because they imagine that it will remove some of the competition of seniors from which they now suffer. We do not think that it would do so. It is not at all certain that with the silks of our new Q. C.'s, the code of etiquette and rules of Court which their brethren obey in England and Ireland, would be also introduced and obeyed.† The experience of the past nine years, during which quondam law officers have had precedence, rather shows that it would not always be observed; and even if that code were strictly obeyed the new system would possibly create a class of "old juniors" whose experience and connection would enable them to engross a large share of business. It is probable that in a small field like the bar of Scotland the evils which are felt to exist in England, Ireland, and Canada, would be greatly aggravated. Nor has there hitherto been in Scotland, at least since the time of the Secession of the Advocates, any interference by the Crown with the time-honoured privileges of the Faculty. It may be doubtful (though on the whole we think it expedient) whether the Crown ought to be invoked to give to its own former officials that precedence in England which they at present enjoy by the vote of the Faculty in Scotland. Hitherto in such matters the Faculty has been sufficient for itself, and we should be sorry if it were to lose its independence for the sake of giving to one or two leading counsel the vain bauble of a silk gown and the empty honour of a place within

* The following sentences are from the *Law Times*, the principal organ of the legal profession in England, in the article to which we have already referred:—"No one can deny that, even with good intentions, and with a certain affectation of conscientiousness, the promotions at the bar are sometimes a cause of great scandal. That private individuals should feel aggrieved is natural; but that the public should be made to suffer for this jobbery and political by-play is a very serious mischief. There are, no doubt, some 'behind the bar' quite as competent to take 'leading business' as their more honoured companions in the race." The same volume contains (p. 481) an article quoted from a Canadian legal periodical, complaining bitterly of the same abuse of government patronage in that colony.

† The chief of these rules appear to be: No senior takes a brief in any case without a junior. (Cook *v.* Turner, 12 Sim. 649). Juniors open every law argument, make all motions of course, and in equity move all cause petitions, and read all proofs in cause petitions. Juniors have always precedence in making motions on the last day of term: and a senior counsel (*i. e.* Q. C.) may not sign pleadings in law or equity unless first signed by a junior. See *Irish Law Times*, May, 1869.

the bar. At least if the aid of the Crown is to be invoked, let a line be drawn beyond which it shall not be easy to pass. Such a line appears to have been distinctly laid down by the Faculty itself in the resolution of March 20, 1858.

The proposal to substitute a "hard and fast line" for the present indistinct and shifting boundary which separates senior and junior counsel at the bar of Scotland, has not been made now for the first time. It may be interesting to review briefly the history of the question in recent years. (See also an article on "Professional Clothes Philosophy," *Jour. of Jur.*, Feb. 1860, vol. iv. p. 57.) At a meeting of Faculty held on 16th March 1852, it was resolved "that in the opinion of the Faculty it is fair and reasonable that those of their number who have held the office of Lord Advocate or Solicitor-General should, notwithstanding the loss of office, retain the position of leading counsel;" and that a committee should be appointed to inquire as to the best mode of carrying that opinion into effect. The committee then appointed consisted of Messrs R. Thomson, H. J. Robertson, Hamilton Pyper, G. G. Bell, C. Neaves, R. Handyside, W. Penney, C. Baillie, T. Mackenzie, A. S. Logan, P. Macfarlan, John Millar, and A. T. Boyle, most of whom have since reached the judicial bench. They reported that they found "the adoption of any steps by the Faculty for regulating precedence at the bar, so as to accomplish the object in view, was attended with such serious difficulties, that they were under the necessity of recommending to the Faculty not to take any such step, but to leave the rules of precedence as they have hitherto stood." It was accordingly resolved to take no further steps in the matter. A motion made a few weeks after (June 8) that the Faculty should memorialize the Queen to appoint Queen's counsel in Scotland as in England and Ireland was also negatived.

In the summer session of 1857 the question was again raised by a letter from Mr Moncreiff, then Lord Advocate, to the Dean of Faculty (now the Lord Justice-General), in which, after referring to the discussion of the same question in 1852, he suggested that the law officers of the Crown should receive a certain amount of precedence after they lost office, and that the Faculty should memorialize the Queen to confer patents of precedence on certain of its members. A committee was appointed (3d June) to consider and report upon this communication. It consisted of Messrs Buchanan, Pyper, G. G. Bell, Penney, G. Dundas, Baillie, Logan, Macfarlan, Cleghorn, Young, Millar, N. C. Campbell, J. P. Wilson, A. R. Clark, A. Moncrieff, and A. Broun, convener. They reported in favour of the first part of the Lord Advocate's proposal, that relating to the office of Lord Advocate and Solicitor-General. They were of opinion that the precedence should be "grafted, as it were, on the Crown appointment," and not left optional (either to the Faculty or to the holders of these offices) to be taken up or rejected, given or withheld, at the moment of retirement from office; that no change should be

made in regard to the precedence of the Dean of Faculty; and that "at present it would not be expedient to extend the system of precedence under consideration to other leading counsel than those already mentioned. A minority of the committee held a different opinion on the last point, but were not yet able to suggest any practical measure on the subject, which, while it removed the anomalies of which they complained, might not introduce other anomalies even more objectionable."

On 20th March 1858, the Faculty came to a resolution granting precedence to advocates who have held the two chief crown offices, after the Lord Advocate, Dean of Faculty, and Solicitor-General. This is the existing arrangement.

On 8th July 1859 it was remitted to a committee "to consider whether the Faculty would take any farther steps in regard to the position of those members of the bar to whom precedence is accorded by the resolution of 20th March 1858." The report of this Committee, which was adopted by the Faculty, is of considerable historical interest, and we therefore print it *in extenso*. It is right to say that it is almost in the words of a statement laid before the Committee by the convener, Mr Fraser, (to whom we are indebted for so much light thrown on innumerable dark places of Scottish legal history,) and was prepared by him with the aid of Professor Macpherson and Mr Harry Smith :—

REPORT OF COMMITTEE ON SILK GOWNS, &c.

"The Committee beg to report, as their unanimous opinion, that no further steps should be taken in the matter that was remitted to them, and that the subject should be allowed to drop.

"The present arrangements as to Robing, and as to the place from which Counsel shall address the Court, having subsisted for so long a period, without any proposal for a change, the Committee think that this proves that no practical inconvenience results from them. The Bar in Scotland is too small in numbers to warrant distinctions of the character suggested, among its members; and even supposing the proposed changes had more recommendations in support of them than they have, it does not clearly appear that one of them, at least, could be effected without the authority of Parliament.

"At the same time, the Committee will state the history of the matter, so as to enable the Faculty themselves to form an opinion on the following points :—

"1*st*, Whether the Faculty can, of their own authority, and by a resolution of the body, authorize the use of silk gowns, and of pleading within the Bar by parties who have ceased to be Crown lawyers; or, 2*dly*, Whether the Court must grant authority for that purpose; or, 3*dly*, Whether the authority must come from the Crown.

"'The Faculty of Advocates is—the whole society of them—considered as a corporation' (Bankton, vol. ii., p. 486), and as such it has enacted rules and regulations in regard to its own affairs, and the admission and education of its members, independently altogether of the Court and the Crown. The matter was fully considered in 1855, when the existing regulations as to the examination of intrants were enacted by the Faculty, without asking the sanction or allowing the interference of the Court. In the minutes there are entries of resistance by the Faculty of orders made upon them by the Court. Thus, on 20th February 1796, the Rev. W. Brown having complained to the Court that the Hon. Henry Erskine had improperly refused to return a fee, the Court appointed a 'Committee of the Faculty' to inquire. This was objected to on the part of the Faculty, on the ground that they alone could appoint a committee to inquire into the conduct of one of their number. The Court acquiesced in this view, and recalled the appointment.

"But there does not occur from the beginning to the end of the minutes of Faculty, nor in the Acts or Books of Sederunt of the Court, nor in any other work, so far as the Committee are aware, any instance where the Faculty, of their own authority, made regulations in regard to such parts of their professional duty as had reference to their appearance and pleading *in Court*. Matters of internal regulation in regard to the admission or expulsion of Members, they took into their own hands; but as to the *place* from which they should speak to the Court, the authority of the Court or the Crown was always invoked.

"The only counsel at present entitled to wear silk gowns, and to plead within the Bar, are the Lord-Advocate and the Solicitor-General; and the history of the privileges conferred on them may afford a guide for the Committee now.

"1. The right of the Lord Advocate to plead within the Bar has the authority of statute. By the Act 1537, cap. 57, it is enacted, 'that nane Advocate nor Procurator *within the Bar* stand to ply, bot passe outwith, with the partie, except the Kingis Advocat.' And the King, on 20th January 1538, sent a letter to the Court, directing them to allow the Lord Advocate to remain during the advisings of the Bench, which then took place in private.* The Lord Advocate also acted judicially, and had a vote with the Judges in the decision of causes.† In those cases where he himself was counsel, his vote was rejected. 'Mr James M'Gill allegit that the Advocate sulde nocht remain and vote on the mater forsaide, becaus the accione is perseuit be him, and at his instance as Advocate, and therefor sulde nocht vote. The Lords be sentence interlocutour findis that the Advocate sulde ryse, and pass to the Bare, and nocht vote thereon.'‡

"With regard to the Solicitor-General, there is the following provision in an Act of Sederunt, 28th February 1662:—'The Macers are authorized to remove all persons of whatsoever quality who shall be found within the innermost Bar, where the Ordinary, Lords, and Clerks do abide, except the Keeper of the Minute-Book, the *King's Solicitor*, and one servant appointed by his Majesty's Advocate.'

"But this privilege was soon taken from the Solicitor, and the old practice returned to, of allowing only the Lord Advocate and Clerks to be within the Bar.

"On 16th December 1686, the Court, without any instructions from the Crown, and upon their own authority, issued the following declaration in regard to the parties who had right to come within the Bar:—

"'The Lords of Councill and Session considering, That by the ancient custome, no persones, of whatsoever quality, were permitted to come within the Barr of the Inner House dureing the time of debateing causes, except his Majesty's Advocat, the Clerks of Session, the Clerk of the Bills and his deput, and one Macer: They do revive that custome, and ordain the same to be duely observed in time comeing, dischargeing hereby the Macers to permitt any persones, except those above exprest to come within the said Barr, as they will be answerable on their perill: And in case any person be desyreous to speak with any of the Lords while they are upon the Bench, that he call for a Macer at the door, and give notice thereof by him: It is always hereby declared, that the Lord Thesaurer, and Thesaurer-depute, or the Commissioners of his Majestie's Thesaurary, not being of the Bench, shall be allowed to be within the Barr when the King's causes are called and debated, and no otherways.'

"In 1718, when Forbes published his collection of Decisions, he describes the Lords as sitting at a semicircular bench; 'the Bar, like a diameter line, at which the Advocates, and *even the King's Solicitors*, stand and plead, uncovered, is opposite to the Bench. Her Majesty's Advocate sits in a chair within this Bar and pleads always with his hat on.'§ The practice of the Advocate pleading with his hat on was introduced in the time of Sir Thomas Hope, who was Advocate to King Charles I. 'This indulgence he owed to his having two sons on the Bench, Sir John, his eldest, and Sir Thomas, Lord Kerse.'‖

"The Crown, however, interfered on behalf of the Solicitor-General. When Charles Areskine, afterwards Lord Tinwald, was appointed sole Solicitor on 10th June 1725 (it being the practice both then and afterwards to have more Solicitors than one), he produced a letter to the Court from the King in the following terms:—

* Recorded in the Acts of Sederunt.
† See Acts of Sederunt, 17th Nov. 1610, p. 69.
‡ Acts of Sederunt, 4th Feb 1564, p. 47.
§ Preface to Forbes' Collection of Decisions.
‖ Notes to Tait's Index, p. 600.

"'George R.—Right trusty and well-beloved, we greet you well: Whereas, we have appointed Mr Charles Areskine, Advocate, to be sole Solicitor for that part of Great Britain called Scotland, and we being pleased to show him a further mark of our royal favour, it is our will and pleasure that a seat be placed for him within the Bar of your Court, where and from whence he may be at liberty to plead cases in your presence; and we do hereby direct you to cause such to be placed accordingly. Given at our Court at St. James, this 3d day of June 1725, in the 8th year of our reign. By his Majesty's appointment, sic subscribitur, ROXBURGH.'*

"The entry in the Book of Sederunt bears that the letter was read and ordered to be recorded, that the Solicitor took the oaths, 'and that the Lords appointed a seat for him within the Bar.'†

"When Robert Dundas was appointed Solicitor in 1742, he produced a similar letter, and the entry in the Books of Sederunt is in the same terms.

"But when Henry Dundas was appointed Solicitor in 1766, no letter appears granting him this privilege, and the Minute in the Sederunt Book does not confer it.

"From Tait's Reports, it would appear that the privilege thus granted by the Crown to the Solicitor had come to be recognised in 1775, as one he was entitled to claim irrespective of express grant. Tait states that "when Mr Montgomery presented his commission as sole Solicitor, with the whole privileges of his office as enjoyed by his predecessors, the Lords understood one of them to be his being allowed to sit and plead within the Bar; therefore he was admitted to do so. Formerly, the Solicitors used to get a special letter to that effect; but now when there is only one Solicitor, it is held to be a privilege of his office, not when there is two.'—(5 *Brown's Sup.* p. 603).

"Apparently it was upon some idea of this kind that the two Solicitors in Bankton's time acted—'The Solicitor takes care of the King's interest as assistant to the Advocate. Both have the privilege of pleading within the bar; at least the Solicitor formerly enjoyed it, though *now* the two gentlemen joined in the commission as Solicitors do not use such privilege.'—(*Bankt.*, vol. ii. p. 492).

"In modern times the practice is for the President of the Court to direct the Solicitor to take his seat within the Bar, after he has taken the oaths.

"Thus it will be seen that the Lord Advocate has right to sit within the Bar in virtue of a statute; and the Solicitor's admission to the same privilege may be said to have originated with the Crown, since the Act of Sederunt of 1662 was repealed in 1686.

"At the same time, the Court seemed to have asserted the right to admit such parties as they pleased within the Bar. By the Act of Sederunt of 16th December 1686 above quoted, they permitted the Lord Treasurer, or the Commissioners of the Treasury, to be within the Bar when Crown causes were heard. And by Act of sederunt of 7th July 1763, 'this day the Lords resolved to admit all the members of His Majesty's Most Honourable Privy Council, whether Peers or Commoners, within the Bar, and to have a seat in this house'—(p. 541). This was a decided alteration of the old rule and practice. Fountainhall reports a case where the practice was thus stated—'The Marquis of Montrose compearing to choose his curators *in presentia*, the Lords, by the fault of their macers, suffering the Lady Marchioness, his mother, and many with her, to enter within the Inner Bar, were necessitated to desire her to remove; and then cause signify it was the privilege of none to stand within *but Dukes and Duchesses*—which my lady obeyed.'—(*Marquis of Montrose, 8th Nov.* 1695, 4 *Brown's Sup.* 277).

"From the preceding narrative, it would follow that both the Crown and the Court have the right to authorize any parties whom they please to come within the Bar—a right that has never been claimed by the Faculty itself.

"II. On the matter of professional costume, the following is all the information that can be obtained from any of the records.

"The wig and gown, at present used, are not prescribed by any regulation of the Court or of the Crown, or even of the Faculty. The costume seems to have come gradually into use, and differs from that prescribed by law.

"So early as 1455 (long before the institution of the Court of Session), the Scottish Parliament enacted, 'that all men of law that are forespeakers for the cost [hired advocates], have habits of *green*, of the fashion of a tunykill, and the sleeves to be open as a tabart.'—(1455, *c.* 12, 2 *Thomson's Acts*, p. 43).

* MSS. Records of Privy-Council.
† MSS. Books of Sederunt.

The matter remained without any farther regulation for nearly 200 years. In 1609, it appears that even Judges wore no professional costume; and the same may be inferred as to Advocates. By the Act 1609, c. 8, the whole matter was referred to King James VI. by the Scottish Parliament, thus—"And because a comelie, decent, and orderlie habite and apparrell in the Judges of the land, is not onely ane ornament to themselves (being a badge and marke for distinguishing them from the vulgar sort), but the same also breeds in common people that reverence and regard that is due and proper for men in these places. And this being a custome universallie observed almaist through all Europe, the want whereof is greatlie censured by strangers resorting in these parts. The saids Estaites, therefore, upon infinite proves they have of His Majesties maist singulare wisdome in all his directions, and of his gratious love and affection to this his native kingdome, have, in all humilities, referred to his Highness awne appoyntment the assigning of any sik severall sort of habite and vestement as shall be in his Majesties judgment maist meet and proper, as well for Lords of Session, being the supreme judges in civill actions, as for all other inferior judges of the lyke causes. As also for the criminall and ecclesiasticall judges, and for *advocats, lawyers, and all others living by law and practice thereof*; that sa every ane of these people may be knawn and dignosced in their place, calling, and function, and may be accordinglie regarded and respected. Attour, his Majestie and Estaites foresaids, considering what slander and contempt hes arisen tc the ecclesiasticall estate of this kingdome by the occasion of the light and undecent apparell used by some of that profession, and cheeflie those having vote in Parliament. It is therefore statute, that everie preacher of God's word shall hereafter wear black, grave, and comelie apparell, beseeming men of their estate and profession; as lykewyse that all pryors, abbots, and prelats, having vot in Parliament, and especiallie bishops, shall weare grave and decent apparrell agreeable to their funcion, and as appertaines to men of their rank, dignitie, and place. And because the haill Estaites humblie and thankfullie acknowledges that God of his great mercy has made the people and subjects of this countrie sa happie as to have a King raigne over us, wha is maist godlie, wyse, and religious, hating all erronious and vaine superstition, just in government, and of lang experiences therein, knawing better than any king living what apperteins and is convenient for every estate in their behaviour and duetie. Therefore it is agreed and consented to by the said Estaites, that what order soever his Majestie in his great wisdome shall think meet to prescrive for the apparrell of Kirk-men, agreeable to their estate and moyen, the same being sent in writ by his Majestie to his clerk of register, shall be a sufficient warrant to him for inserting thereof in the buikes of Parliament, to have the strength and effect of ane act thereof.'

"Following up this statute, the King sent a letter to the Privy Council, dated 16th January 1610, which will be found printed in the first volume of the 'Miscellany of the Maitland Club,' p. 149. A proclamation was thereafter issued, dated 30th January 1610, which acknowledges the King's 'singular wisdome in all his princelie directionis, and his gratious love to this his antient and native kingdome,' in reference to the apparel, 'alswele for the Lordis of Sessioun, being the supreme judgis in civile actionis, as for all utheris inferiour judgeis in the lyke causes, as also for the criminal ecclesiastical judgeis, and for advocats, lawyris, and all utheris leving by law and practize thairof, as also for churche men.' His Majesty, it was stated, had sent certain directions, but reserved to himself to add thereto on more due consideration, and when he had more leisure. The directions as to the lawyers were—

"'That the President and remanent ordinarie Lordis of Sessioun sall weare a purpour (purple) cloath gowne, faced all about with red crimson satyne, with a hood of purple, lyned with crimson satyne also, according the model and forme of a gowne send downe be his Majestie to be a pattern for all gownes of ordinarie sessionaris, onlie the Presidentis gowne sall be faced with red crimson velvet, and the hood lynit with red crimson velvet.'

"This seems to be the gown at present worn by the judges.

"With regard to the bar, Clerks of Session, and Writers to the Signet, the regulation was, 'that the advocatis, clerkis of the sessioun and signet, sall haif their gownis of black, lyned with some grave kind of lyning or furring.'

"Regulations are also made as to the gowns of the Justiciary Judges; but these were ultimately settled by the subsequent Act 1672 c. 16.

"No notice is taken of Procurators before Inferior Courts.

"The gown of the Advocate, it will be observed, was to be lined. An idea of what it was may be obtained from drawings in the Lyon Office, representing the

order of the funeral of the Chancellor Rothes in 1681. Representations are given in the drawings of all who attended in their robes. The gowns of the Judges appear to have been the same then as now. The Lord Advocate also appears in the same full dress gown as worn by him, on important occasions, at present. The Dean of Faculty and Solicitor-General are not distinguished as wearing any different gowns from the ordinary bar; and at what time this latter officer assumed a silk gown, I (*sic*) cannot ascertain. The gowns of the outer bar are represented in the drawings as having ornaments down the front, very much like the braiding on the gown of the Lord Advocate. The whole bar wore *bands and full bottomed wigs.* The bands went out of general use in the course of the succeeding half century; and in the Faculty minutes on 19th June 1766, there appears a notice of motion to this effect, 'That for the more decent habite and apparel of the advocates, and to distinguish them from others who wear either the same apparel or very little different from it, that it should be resolved that the advocates shall wear bands as a part of their formalities; that the Dean and his council shall wait on the Lord President and lay before his Lordship this motion, and pray his Lordship's and the Court's approbation. The Faculty delayed the consideration of this affair till some after meeting.' Nothing farther was done in the matter by the Faculty, and the delayed motion has yet to be taken up. At what time bands were entirely given up cannot be traced. In Crosbie's picture, which hangs in the Library entrance, he is represented as wearing bands. And at present, when a member of the Outer Bar pleads before the House of Lords, the bands are resumed.

"The only body that seem to have worn, at the funeral of the Chancellor, the plain stuff gown now worn by Advocates, were the professors in the University; and it is probable that convenience and considerations of economy may have recommended it to the bar in later times.

"It will thus be observed that the professional costume of the Bar was prescribed by the Crown in virtue of *statutory* authority; and any difficulty as to the source from which orders should be taken on the matter at present, would have been at once obviated, had the statute of James still continued operative, as a perpetual reference of this matter to the sovereign for the time. It is however not so. All doubt as to the temporary character of the Act 1609 is taken away by the Act 1633, c. 3, which shows that the parliament of 1609 did not hand over the regulation of the subject to every reigning sovereign. It required the special Act 1633, c. 3, before Charles I. could exercise the authority which had been conferred on his father, so far at least as *kirkmen* were concerned; and such also seems the construction applicable to the clause in the Act 1609, c. 8, referring to judges and advocates, which is as personal to King James as the subsequent clause referring to kirkmen.

"The Act 1633, c. 3, enacts, 'Remembering that in the Act of Parliament made in the year 1609, anent the apparrell of judges, magistrates, and kirkmen, it was agreed that what order soever his Majesties Father of blessed memorie should prescrive for the apparel of *kirkmen*, and send in writ to his Clerk of Register, should bee a sufficient warrant for inserting the same in the bookes of Parliament, to have the strength of an Act thereof, HAVE all consented that the same power shall remaine with the person of our Sovereigne Lord, *and his successours that now is*, and with the same clause for execution thereof, as in the said Act is contained.'

"The statutory authority—personal to James VI.—having expired, so far as regards Advocates, the question arises whether the Crown has any inherent right, independently of statute, to prescribe the professional robes of any of the members of the corporation. No such authority has ever hitherto been claimed; and the Acts 1455 and 1609 would have been unnecessary had it existed.

"The COURT have never interfered in any authoritative way with the costume of the Bar. The only notices that can be found of their attention being directed to the matter of robing, are the following. In the minutes of Faculty of 19th November 1675 there is this entry:—'The Deane of Facultie having represented the inorderlie way which was used in ye Criminall Court and yat ye Lords *recommended* to the Advocats to appeir in yair gownes; which being considered, all Advocats wer desyred to appear in yr gowns.'

"Again, in the Acts of Sederunt of 23d June 1750, there is a statement to the effect, that *the Writers to the Signet* 'desired to wear their gowns in the Session House, according to the ancient custom, if the Lords would approve of their so doing, *to which the Lords made no objection.*'

"The FACULTY again seem to have considered the matter either below or above their notice; for except the above order to appear in their gowns in the Justiciary

Court, and the motion about bands (which came to nothing), there does not occur in the minutes (which however only extend as far back as 1661) any entry relative to robing. The successive changes in the style of both wig and gown were probably only acquiesced in by the general mass of members, after an interval of years from their introduction. These changes were numerous. Bands have disappeared; and so have the full bottomed wigs, and the powder; and the professor's gown has come in place of the ornamented garment lined with fur, prescribed by King James, and represented in the above mentioned drawing; and lastly, the Solicitor-General—apparently by no warrant but from himself—assumed a silk gown.

"It is probable that the reason why the Crown has not exercised the same direct interference with the Scots, as it has done with the English Bar, is, that the Court of Session is a Court created by *statute*, which defines its constitution and powers. In this respect it differs from the English Courts. The Queen's Bench is a Court in which the Sovereign was formerly accustomed to sit in person, on which account it was moved with the royal household; and the Committee understand that the Exchequer and Common Pleas also derive their prigin from royal, and not parliamentary authority. It is obvious that the power of the Crown would be more direct and influential in the arrangement of such Courts, than it could be, with reference to a statutory Court like the Court of Session."

The Month.

Report of the Digest of Law Commission.—The Royal Commission on the Digest of Law for England has presented its first report. It is not a valuable or instructive document. It informs us that the statutes are contained in 45 volumes, and that the judicial decisions occupy upwards of 1,300 volumes, comprising as they estimate nearly 100,000 cases, exclusive of about 150 volumes of Irish Reports. The only passage of interest in the first part of the report is that which states the sense in which the Commissioners understand the word Digest to be used in their Commission, viz.: "a condensed summary of the law as it exists, arranged in systematic order, under appropriate titles and subdivisions, and divided into distinct articles or proportions, which would be supported by references to the sources of law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated had been illustrated or applied." They enlarge on the advantages of a Digest, and add; "the persons charged with the framing of the Digest, might also be entrusted with the duty of pointing out, from time to time, the conflicts, anomalies, and doubts, which in the course of their labours would appear. Thus the process of constructing the Digest would be conducive to valuable amendments of the law. Those amendments would be embodied in the Digest in their proper places. Moreover such a digest would be the best preparation for a code, if at any future time codification of the law should be resolved on." Having arrived at this general, and, we imagine, foregone conclusion, the Commissioners proceed to give their views as to the construction of a Digest. They say, "it is obvious that, whatever arrangement is adopted, a certain number of

functionaries must be employed, at a high remuneration, in the capacity of Commissioners, assistant Commissioners, or secretaries, and that there must be a considerable expenditure on the services of members of the legal profession, employed from time to time in the preparation of the materials to be ultimately moulded into form by or under the immediate supervision of the Commission or responsible body." They recommend, however, that "a *portion* of the Digest, sufficient in extent to be a fair specimen of the whole, should be *in the first instance* prepared," as an experiment, and that powers should be conferred on themselves to carry this recommendation into effect. If the country approves they could then proceed further. The Spectator remarks, "That scheme would give us a Digest in the year 2067. If the Government really want a Digest, let them give Lord Westbury, Mr Low, and Mr Maine an engagement to pay them L.60,000 when it is completed. The Digest would be ready in three years, and would be nearly as good as a Code."

The Liability of a Master for the Fault of a Foreman.—The first Division of the Court of Session has decided in the case of *Wilson* v. *Merry and Cunningham*, May 31, the broad principle that a foreman is a fellow-servant; thus bringing the law of Scotland into unison with that of England, as stated in the late case of *Feltham* v. *England*. It does not appear how far this decision will be held as conflicting with or overruling various judgments *tempore* Colonsay, which distinguish a servant with very large powers, amounting to general superintendence, from an ordinary foreman. See *Journal of Jur.* for April last.

The Summary Procedure Act.—The present Lord Justice-General has never been timid in expressing his opinions on points of law, and we are indebted to him for many important views and lucid expositions which some judges would have kept to themselves as "being unnecessary for the decision of the question before them." We confess that it seems to us more in harmony with the duty of the judge to explain the law when called upon to do so by a combination of facts which really raise a point, than to try every possible way of escaping from the decision of a principle, and to make a judgment depend on a specialty or a technicality. We do not know of any case in which the moral courage of the Court under the inspiriting guidance of the Lord Justice-General has conferred a greater benefit on the public than in its recent decision in *Halliday* v. *Bathgate* (High Court, May 31). It had been supposed for some time that the Summary Procedure Act 27 and 28 Vict. c. 53, which provides in sec. 16 that "it shall not be necessary in any procedure under the authority of this Act to record or to preserve a note of the evidence adduced," rendered it impossible to exercise the right which every man possesses at common law of having a sentence pronounced against him by an inferior Magistrate reviewed by the Supreme Courts of the land. This opinion had even received support from observations uttered on the bench. In the case referred to the suspen-

der failed, because in point of fact no note of evidence was taken, and he had not asked that such a note should be taken. But the Court, which consisted of six judges, and had heard a full argument on the construction of the Act, expressed an opinion that the words quoted do not take away the right of appeal which is expressly given by the Tweed Fisheries Act of 1857 (20 and 21 Vict. c. 148), and do not repeal the provision incidental to that right that "when either party to a prosecution requires the Sheriff or Justices to take notes of the evidence to be adduced, such Sheriff, &c., shall be bound to do so," &c. (sec. 93) Therefore, the suspender in the present case might have had a record of the evidence if he had asked for it in the inferior court. This is a much more limited construction of the Summary Procedure Act than that which has been generally received; and it may remove some of the objections to it which have been pointed out in our pages, and which last year led to the introduction into Parliament of a bill for its amendment. One question of much importance is, however, not expressly decided by this judgment. At common law, and apart from statute, the rule is, as laid down by Lord Justice-General Boyle, that "in criminal cases, unless there be an express dispensation, the evidence on which sentence may pass must be in writing properly authenticated and preserved with due care" (*Penman*, 25th Nov. 1845, 2 Broun, 586; cf. *Christie*, 1st Oct. 1853, 1 Irv. 293). It was commonly supposed that this rule was entirely repealed by the Summary Procedure Act. But in the light of *Halliday* v. *Bathgate* it seems to be still open to argue that only the absolute duty or obligation laid upon the Judge is removed, while either party in a prosecution before an inferior judicatory may still require the magistrate to take notes of the evidence adduced.

Appointments.—The present Government could have done no more graceful or more creditable act than that which it has done in appointing Mr Henry Glassford Bell, Advocate (1832), to the honourable position of Sheriff of Lanarkshire. Mr Bell has well earned this promotion by years of able and conscientious labour as a Sheriff Substitute in Glasgow, during which his work has not only commended itself to the community in the midst of which it was done, but has gained the approbation and encomia of some of the ablest Judges before whom his decisions have been brought for review. His appointment, moreover, will give satisfaction in many quarters, because, as Mr Bell himself said in the sort of inaugural address which he delivered on June 14, "an important principle has been conceded by his promotion. The members of that most useful and intelligent body of resident judges, known by the somewhat inappropriate name of Sheriff-Substitute, will no longer feel themselves excluded from all hope of advancement, but will, on the contrary, calculate on receiving, as opportunity offers, some reward for long and laborious services. Their position has been materially improved of late years through the just liberality of Government; but nothing is more likely to encourage good men to accept of so toilsome an

office than the knowledge that it may, if worthily sustained, be regarded as a stepping-stone to something higher." There have now been within a year or two two promotions of this kind, which certainly afford some encouragement to Sheriffs-Substitute. But it is to be remembered that the appointments of Sheriff Jameson and Sheriff Glassford Bell have been earned by very long service and unusual merit. While therefore we are glad that the principle of promotion which Mr Bell refers to should be vindicated, there is no reason to imagine that, if the office of principal Sheriff continues to exist, it is likely to become the general rule.

There is not much to be said about Sheriff Bell's speech to the Glasgow Procurators. It contained a good deal of pardonable egotism, and some magnifying, also quite excusable in the circumstances, of the importance of the Glasgow Sheriff Court. It also contained the announcement, certainly unpalatable to many among his audience, that he hoped "to secure the services of an acceptable member of the Faculty of Advocates to supply the vacant Sheriff-Substituteship." It was indeed rather a flight of imagination to suppose that any member of the Faculty of Advocates could be acceptable to the Glasgow Bar in such a capacity; but we do not think that the public will censure Mr Bell for the extreme anxiety which he has shown to discharge this part of his duty in a satisfactory manner for the interest of suitors. One thing only in Sheriff Glassford Bell's past career as a judge calls for criticism,—his systematic neglect of the most important part of a local judge's duties, the work of the Small Debt Court; and unfortunately he declares his intention of continuing this neglect. No part of a Sheriff's functions is more difficult in itself than to preside well in this tribunal, and none, both from the number of cases adjudicated upon and the class of litigants who attend the Court, more closely touches the social welfare of the community,—none, moreover, has a more intimate bearing on the confidence and respect entertained by the multitude for the law and its administration. We hope that Sheriff Bell will reconsider his determination to sit in the Small Debt Court only on rare occasions.

Mr Glassford Bell's selection of a gentleman to fill the place of Sheriff-substitute at Glasgow, which has become vacant in consequence of his own promotion, indicates both an honest desire for the public good, and a sound discrimination in the choice of means towards that end. From among many eligible men who would have been ready to accept the office, he has appointed Mr Francis William Clark, Advocate (1851), who has enjoyed a considerable practice at the bar, and who is the author of a Treatise on Partnership and Joint-Stock Companies, now in the hands of all professional men. Mr Clark's familiarity with commercial law makes him particularly well suited for the judicial bench in Glasgow. There is certainly no ground for saying that he owes his preferment to any political bias or influence, for men of all parties unite in acknowledg-

ing his great merit and ability. We observe that Sheriff Bell makes a sort of apology for not giving Mr Clark the highest place among his Substitutes. Certainly, if it was ever in contemplation to adopt that course, there were few men at the bar whose character and attainments would have better justified the rather invidious step of superseding in his favour the other learned gentlemen who are now Sheriff-substitutes in Glasgow.

Mr Archibald Broun, Advocate (1838) has been appointed Principal Clerk of Session in place of Mr Currie, whose retirement was noticed in last number. Mr Broun has long been well known as the Editor of two volumes of Reports of Justiciary Cases, and as the Senior Advocate-depute under the present and the preceding Tory governments. Mr Broun is one of those in whom professional merit has not been attended by the due amount of professional success; and this somewhat late preferment to a respectable and not laborious office, has been received with much satisfaction in the Parliament House.

The vacancy in the office of Advocate-depute, caused by Mr Broun's appointment, has been filled up by the promotion of Mr Robert Lee, Advocate (1853); and Mr Lee is succeeded as Advocate-depute in the Sheriff Courts by Mr Wm. Ellis Gloag, Advocate (1853). These appointments are both unexceptionable.

The Faculty of Advocates, and those who have frequented their library, will greatly miss the valuable and ever ready aid of their accomplished Sub-Librarian, Mr Thomas Dickson, who has been appointed Assistant Curator of the Historical Department of the Register House. We heartily congratulate Mr Dickson on his promotion.

CAN A MINOR HOLD A PUBLICAN'S LICENSE?—The *Law Times* reports a case at Shrewsbury Sessions in which this question was raised under the English statute 9 Geo. IV. c. 61, which is similar in its terms to the Home Drummond Act passed in the same year. The application having been adjourned in order to obtain the opinion of counsel, was afterwards withdrawn. The following were the questions submitted for counsel's opinions, and the joint opinions of the Solicitor-General and Mr R. E. Turner thereon:—

"Counsel will please to advise the magistrates

"Whether, in their opinion, a minor is or is not a fit and proper person to be licensed within the terms and meaning of the Act of Geo. 4, c. 61, and whether or not they would be acting legally, and on a sound interpretation of the Act, in permitting a transfer of the license in question to a person under the age of twenty-one years.

"We are of opinion that a minor is not a fit and proper person to be licensed within the meaning of the Act, and that the magistrates would not be acting legally, or on a sound interpretation of the Act, in permitting a transfer of the licence in question to a minor.

"JOHN B. KARSLAKE.
"R. E. TURNER.

"Temple, April 6, 1867."

Mr Edwards (the clerk) also stated that he had letters from Mr Oke, chief clerk to the Lord Mayor, and the author of the Synopsis, &c., Mr Stone, author of the Justices' Manual, and other justices' clerks, to the same effect. Also a letter from the Solicitors to the Inland Revenue, pointing out that, under 7 and 8 Geo. 4, c. 53, s 20, no entry under the Excise Laws is a legal entry which is not made by a person who has attained the age of twenty-one years.

WRONGFUL IMPRISONMENT.—A case came before the Q. B. on May 30th, involving

the question whether a commander of a coastguard was justified "by reason of his office" in giving a man into custody on a charge of felony. This case gave rise to a remark by Mr Justice Blackburn that he thought it would be wise if the law were that no person should give another into custody unless there were some probability that the other person would run away. We have frequently felt that this would be a very salutary regulation. When the passions are excited, a private person is very apt to resort to the criminal law, and if it were to be made an element in actions for false imprisonment that the defendant should prove that he believed the plaintiff was about to run away, a resort to the harsh exercise of the criminal law would be far less common.—*Law Times.*

REVISION OF THE STATUTE LAW.—A bill completing this important work has been submitted to the House of Lords by the Lord Chancellor. The first instalment was passed in 1861, repealing all Acts which had ceased to be in force otherwise than by express repeal between the 10th of Geo III. and the 21st and 22d Vict. In 1863 another Act swept the Statute book in like manner, from the time of Magna Charta to the end of the reign of James II. The present bill clears the way from the rei n of James II. to the 10th of Geo. III By these revisions more than 3000 obsolete Acts have been erased, and the statute law reduced from eighty-seven volumes to some six or seven. The next improvement is to be a carefully prepared and very extensive General Index to all the statutes, which it is proposed to republish yearly, corrected to the legislation of the year, eliminating all that relates to repealed law, and adding the new law. The preparation of this laborious work is to be confided to the competent hands of Sir Erskine May, Mr Wood, and Mr Riley, and Mr Wood undertakes the task of the annual revision. It is expected that this index will be completed by the end of the session of 1868.—*Id.*

SOLICITORS IN THE SUPREME COURTS.—At the general meeting of the Society of Solicitors in the Supreme Courts, held on Monday 3d June, Mr John Carment was elected preses, in the room of Mr Thomas Landale, who has retired; Mr George Cotton was elected vice-preses, Mr John Macandrew was elected fiscal, Mr Thomas Leburn was re-elected treasurer, Mr William Miller, librarian, and Messrs John Young and James Young joint secretaries during the ensuing year.

CALL TO THE BAR.—Mr George S. Dundas has been admitted a member of the Faculty of Advocates.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

TAYLOR & Co. *v.* MACFARLAN & Co.—*May* 24.

Jury Trial—Bill of Exceptions—Putting in Record—Construction of Issue.

This case was tried at Christmas upon the issue—"Whether, in or about Sept. 1862, the defs., on the order of the purs., agreed to supply to them a quantity of whisky coloured with burned sugar, or other innocent material, similar to a sample of Mackenzie & Co.'s whisky then shown to the defenders; whether the defs. delivered to the purs. a quantity of coloured whisky, amounting to 20,554 proof gallons or thereby, for which the pursuers duly paid the stipulated price; and whether the coloured whisky so delivered by the defs. to the purs. was disconform to the said order, inasmuch as it was coloured with some colouring matter not being burned sugar, or other inno-

cent material similar to said sample—to the loss, &c.?" A counter issue was taken by the defs.—"Whether the purs. failed duly to return the said whisky to the defenders?" Purs. stated that, when engaged in trading to Africa, they ordered from defs. a quantity of coloured whisky as much as possible resembling rum, which was the spirit most in favour with the negroes; that whisky was furnished professedly according to sample, and shipped to Africa; but was there found to be so bad in quality that the natives, after obtaining some of it, refused to take any more. The pursuers afterwards found that it had been coloured with a kind of logwood which was noxious and injurious. Defs. denied that burned sugar was the only substance legitimately used for colouring whisky, and maintained that what they supplied was conform to sample. They denied that the logwood was injurious. The jury found for the pursuers. Parties were heard on various exceptions, and on a rule for a new trial, certain of the exceptions were departed from. The third, fourth, fifth, and part of the sixth were argued. The third was to Lord Kinloch's ruling sustaining the purs.' objection to a proposal of defenders to put in article 9 of the condescendence to prove what the pursuers state therein as to the character of the colouring substance. The fourth was to a ruling refusing to allow defs. to put in the whole record for the purpose of its being used in construing the words "innocent material" occurring in the issue. The fifth was to a direction in the charge that the word "innocent" in the issue "was not a legal term, nor one on which it was necessary that he should put a legal construction; and that it was for the jury to say on the evidence whether the thing was innocent or not in the fair and reasonable sense of the word, as employed in ordinary language." Counsel for defender further required the Judge, and excepted to his refusal, to direct the jury (1) that, in order to entitle the pursuers to a verdict, it was not enough for them to prove that the colouring material was injurious to the marketable quality of the whisky; (2) that it was necessary for them to prove that colouring material was injurious to the health of the consumer; (3) that the word "similar" to the said sample relate to the colour of the whisky only, and not to the colouring material.

Lord President—As to the first exception, the defender's counsel, in the course of leading evidence, proposed to put in an article of the record to prove the pursuer's statement as to the character of the substance complained of. The exception condemned itself by its own terms. The record could be used only in two ways at the trial. (1) It was in the hands of the Judge, ready for reference by him, in order to prevent either party from attempting to make out a case at the trial which was not stated on the record. That was one great function of the record under the Judicature Act. His Lordship referred to the judgment of Lord Colonsay in Mackintosh v. Smith, in this Court, as defining the use of the record at trial, in every word of which his Lordship concurred. In the second place, parts of the record might be used for proving facts which were admitted by the opposite party. One great purpose of the record was to give an opportunity of making admissions, and it would be quite contrary to principle and practice to preclude a party from using it for such a purpose. Here, however, defender's counsel proposed to employ it for proving not a fact but a statement, which was an illegitimate purpose for which the record was never intended. The counsel for the defender further proposed, and this was the question raised by the fourth exception, to put in the whole record to be

used in construing the words "innocent matérial" in the issue. If the record could be so used, then by whom? It could not be put in for the use of the Court, which has it already. It must be intended to put it before the jury to aid them in the construction of the issue, and this leads us to consider the rules as to the construction of words in issues. Technical legal words must be explained by the Court, if they require explanation. Words of a technical kind, not used in their ordinary colloquial sense, such as have received a technical meaning by the usage of merchants or in art and science, must be explained in evidence by experts. But words used in their ordinary sense, with no technical or secondary meaning, the jury are to construe for themselves, because issues are as far as possible expressed in ordinary popular language. To suppose that, in discharging that duty, the jury was to be aided by the record, was the most extravagant suggestion his Lordship ever heard. The issue was intended to prevent the record from being sent to the jury at all. The fifth exception was to Lord Kinloch's direction that "innocent" in the issue was not a technical legal word, &c. His lordship was clearly of opinion that it was not a legal term as used in the issue. There was a little more doubt as to the second part of the direction. If his Lordship could read it as a plain abdication of the proper function of the Judge in construing the issue, he would think it not a good direction. But that was too strict a reading. The Judge had not committed any miscarriage; for, with the evidence before them, the jury could not be in any difficulty. If they had found for the defenders, there might have been much more strength in an objection to the charge on this ground by the pursuer.

The other judges substantially concurred, and the exceptions were disallowed. The Court was also of opinion that the rule for a new trial should be discharged.

Act.—Young, Gifford & Asher. Agents—Henry & Shiress, S.S.C.—— Alt.—Decanus, Clark & M'Laren. Agents—Messrs White-Millar & Robson.

WILSON *v.* MERRY & CUNNINGHAM.—*May* 31.

Action of damages at the instance of the mother of a workman who had lost his life while in the service of the defenders as a collier, and, as the pursuer alleges, through their fault. The accident happened in Haughead Pit, Hamilton, and the cause of death was an explosion of firedamp, which blew up a scaffold on which the deceased was working, whereby he was precipitated to the bottom of the shaft. The pursuer alleged that this occurred in consequence of the scaffold being defective, and without proper apertures in it for ventilation, and that fire-damp accumulated below it and came into contact with the lamp of the deceased. The scaffold in question was a temporary erection in the shaft, and on the level of one of the seams of coal, on which the workmen might stand, and on which they might place their hutches when "breaking" into the seam. It was erected by workmen of the defenders, under the orders of the manager, Neish, who, it was not disputed, was a skilful person. Under Neish was Bryce, underground manager. Neish had power to hire and dismiss workmen. Over Neish was a Mr Jack, who takes a superintendence of the defenders' collieries, and with whom Neish was in use to consult on questions of importance. The whole of the working arrangements of the pit, including ventilation,

were left entirely to Neish. It was in evidence that Mr Neil Robson, a partner of the defender's firm, took a management of this along with their other works, and was advised with on matters of importance. Neither Robson nor Jack had had anything to do with the erection of the scaffold. The scaffold had been erected upon a Saturday. The deceased was engaged to work on the Monday, and met his death on the Wednesday following. The pursuer contended that the defenders were responsible for the fault of Neish. The defrs. stated that the scaffold had been properly constructed, and attributed the occurrence by which the deceased was killed to an accidental and temporary obstruction of the holes left in it for ventilation. They also contended that they were not in law answerable for the fault of Neish, if any such should be proved.

The case was twice tried by a jury—in July 1866, and in Jan. last. On each occasion the jury returned a verdict for pursuer, with £100 damages. The first verdict was set aside as contrary to evidence, the Court finding it unnecessary to dispose of a bill of exceptions for the defrs. After second trial, the defenders again moved to set aside the verdict as contrary to evidence; and presented a bill of exceptions. Lord Ormidale had directed the jury that the defrs. were liable for the fault of Neish, in designing and completing the ventilation system of the pit, if that system had been complete before the deceased workman was engaged to work, and if the jury were satisfied on the evidence that the defenders had delegated to him their whole power, authority, and duty in regard to that matter, and also in regard generally to all the underground operations without control or interference. The defrs. excepted, and asked the judge to direct the jury that if they had used reasonable care in the appointment of Neish, and put at his command all necessary means for the proper working and ventilation of the pit, they were not in law responsible for fault or negligence on his part in the arrangements made by him for ventilation at and below the scaffold in question. Lord Ormidale refused to give this direction. [Authorities:—Priestly *v.* Fowler, 3 M. & W. 1; Hutchison *v.* G. N. & B. Ry. Co. 5 Ex. 349, 19 L.J. 296; Tarrant *v.* Webb, 25 L.J.C. 261; Wigmore *v.* Jay, 5 Ex. 354; Somerville *v.* Gray, 1 Macph. 768; Wright *v.* Roxburgh, 2 Macph. 748; Bartonshill Co. *v.* Reid, 3 M'Q. 286; Weems *v.* Mathieson, 2 M'Q. 215.]

The Lord President, after narrating the facts, said—(1) That, looking to the position and duties of Neish, the relation which subsisted between him and the defenders was that of master and servant, and not in any sense that of principal and agent, nor was it in any improper or qualified sense the relation of master and servant; (2) That Neish and the deceased stood to each other in the relation of fellow-servants, although the former was a superior servant, and could control the latter. The circumstance that one servant was superior to another, and entitled to exercise control over him, and give him orders, did not in the least degree prevent their being fellow-servants. There was a certain difference in the relation in which they stand to one another, which, under certain circumstances in a question of this kind, must create a distinction, and lead to results that would not arise in the case of fellow-workmen standing in perfect equality of service. Subject to that qualification the relation of fellow-servants undoubtedly existed. His Lordship then described the nature of the fault alleged against Neish, as stated by the pursuer, which, he said, he should take to be true in disposing of the law of the case. It was that, in constructing

the scaffold, he had failed to leave sufficient holes for ventilation. This was to be distinguished from the case to which it had been attempted to assimilate it, of imperfect machinery or apparatus furnished by a master for working a pit. His Lordship did not wish to detract from the principle that it was a master's duty to furnish proper machinery for his work. But the making of the scaffold in this case was just one of the ordinary operations properly belonging to a pit, carried out by the workmen of the pit under Neish's superintendence. The question, then, came to be—Was a master liable for the fault of such a person as Neish in such a work? His Lordship was of opinion that he was not. This was not the providing of a machine or apparatus; but an ordinary operation carried on by the workmen of the pit with the materials constantly in their hands, viz., wood, one of the materials most commonly in use in a coalpit; and under the superintendence of the pit manager. His Lordship then considered the special terms of the charge, and criticised it. It made no difference in the question that the scaffold had been constructed before the deceased was engaged to work. Neish's duty to make the scaffold safe was a continuous one. The introduction of this element had a tendency to mislead the jury. Some of the other language employed had the same tendency.

The other Judges concurred.

Judgment sustaining the defenders' exception, and setting aside the verdict. In respect of the judgment on the bill of exceptions, rule for a new trial, on the ground that the verdict was contrary to evidence discharged, all questions of expenses being resented.

Act.—Macdonald & Strachan. Agent—T. White, S.S.C.——Alt.—Young, Shand, and M'Lean. Agent—John Leishman, W.S.

DAVIS *v.* HEPBURN.—*May* 31.

Jurisdiction—Sequestration—Notour Bankrupt.

The question in this case was whether the Court had jurisdiction to sequestrate the estates of the heir-apparent to a large property in Scotland, and whether the said estates were liable to sequestration at the instance of a creditor under the Bankruptcy (Scotland) Act 1856, 19 and 20 Vict., c. 79, secs. 13, 7. It appeared from the proof that the respt. was twenty-five years of age and unmarried; that he had, from 1859 till 1863, been an officer in the army; that he had thereafter, with the exception of a few visits to his father's house, lived in England, and at different places on the Continent; and that, during the year 1866, he had only resided at his father's house continuously for a fortnight in the months of April and May. It also appeared that on the assumption of his father's house being his residence, a charge of payment was left for him there at the instance of the petitioning creditor, and that on the expiry of the charge, an execution of search was returned by the messenger to the effect that the debtor could not be found. It was said that this implied "flying or absconding from diligence" in the sense of the Bankrupt Act, sufficient to constitute the debtor notour bankrupt.

The Lord Ordinary (ORMIDALE), without dealing with the question of notour bankruptcy, held that the debtor was not "subject to the jurisdiction of the Supreme Courts of Scotland," and therefore refused the petition for sequestration. The petitioning creditor reclaimed.

The Court held that, without considering whether the debtor was subject to their jurisdiction, it was sufficient for the disposal of the case that there was no proof of notour bankruptcy. The only fact established was that he was not found at his father's house on the occasion of the search. That did not imply absconding from diligence, and therefore no notour bankruptcy was proved.

Act.—Watson & Trayner. Agents—Murdoch, Boyd, & Co., W.S.——Alt.—Munro & Gifford. Agents—Duncan & Dewar, W.S.

S. P. Davies & Co. *v.* Brown & Lyell.—*May* 31.

Reparation—Relevancy—Issue—Malice—Black List.

Action of damages at the instance of S. P. Davies & Co., Dundee, against Brown & Lyell. The defrs. some time ago sued the pursuers in the Sheriff Court for £51, as the price of flour. Davies & Co. aver that when that action was raised, S. P. Davies, the sole partner of the firm, was from home; but on his return he at once waited on defrs. and paid the £51 and expenses, obtained a receipt, and consequently entered no appearance in the action; that, notwithstanding this settlement, Brown & Lyell had, in the knowledge that the debt and expenses were paid, and without notice to the present pursuers, wrongfully, maliciously, and without probable cause, moved for and obtained decree in absence in said action against them, which was published in the *Mercantile Compendium*, and other publications known as "Black Lists," and that the publication was the result of defrs. having wrongfully taken said decree.

The pursuer proposed an issue—"Whether defrs. wrongfully moved for and obtained decree against pursuers in an action, &c., to the loss, &c.?" The defrs. contended that the pursuers had made no averments relevant to entitle them to any issue, and that, even if they had, they were bound to put malice and want of probable cause in issue. The Lord Ordinary (Barcaple) reported. (See *Ormiston* v. *Redpath, Brown & Co.*, 24th Feb. 1866, 4 Macph. 488).

The Court held unanimously that the action was relevant, but (L. Curriehill dub.) that the pursuer must put in issue malice and want of probable cause. There was nothing on record apart from malice which could entitle the pursuers to damages. For all that appeared, the taking of decree might have been the result of a mere omission, for which the pursuers were as much to blame as the defrs. It was no doubt the duty of the defrs., when they received payment, to instruct their agent to stop proceedings, but it was equally the right and interest of the pursuers to see that that was done. With regard to damages, their Lordships indicated a clear opinion that defrs. could not be answerable for any damages arising from the publication of the decree in the "Black List." They could only be liable for the damage necessarily and directly resulting from the taking of the decree and its publication in the record of Court.

Act.—Thoms. Agent—David Milne, S.S.C.——Alt.—Gifford & Berry. Agents—Ferguson & Junner, W.S.

HOEY *v.* M'EWAN AND AULD.—*June* 4.

Partnership—Master and Servant—Dissolution of Firm by Death of Partner—Reparation.

Action by Hoey against M'Ewan and Auld, accountants in Glasgow, and Auld, the surviving partner of that firm, and the representatives of M'Ewan, the deceased partner, to enforce implement or obtain damages for breach of an agreement dated in June 1865, whereby the pursuer agreed to serve the defrs.' firm at a salary of £300 per annum up to September 1865, and thereafter for five years at a salary of £300 and an additional allowance of 10 per cent. on the profits of the business. Defence that the agreement had been terminated by the death of M'Ewan in June 1866, which operated a dissolution of the firm which the pursuer undertook to serve, and further that pursuer had barred himself from pursuing the action by engaging in business on his own account subsequent to M'Ewan's death.

Issues having been proposed by pursuer, and objected to on the ground, *inter alia*, that there was no issuable matter in the record, the Lord Ordinary reported, indicating an opinion favourable to defrs.

Lord PRESIDENT, L. CURRIEHILL, and L. ARDMILLAN, held that the contract must be dealt with as if it had been a contract with M'Ewan, as in fact it seemed to have been; and that M'Ewan's death necessarily put an end to all contracts between him and parties in the situation of the pursuer, where the subject-matter of the contract was personal service. The case of dissolution by death was distinguishable from dissolution by bankruptcy, death being a contingency to which all men were liable, and which no man could prevent. A man by dying could not commit a breach of contract; and there being no breach of contract, there was no room in this case either for implement or damages. The pursuer was no doubt entitled to the whole of his salary of £300 for the year in which M'Ewan died; but that was subject to this qualification, that if he was making anything by business of his own or other employment during that part of the year which elapsed after M'Ewan's death, he was bound to give credit to the defrs. for anything so made by him.

Lord DEAS dissented, holding that the liability of a firm dissolved by the death of one of its partners, for contracts of service made during its subsistence, was a question of circumstances; and that the case should not be finally determined till all the facts were before the Court.

Act.—Clark & H. J. Moncrieff. Agents—Maconochie & Hare, W.S.—— Alt.—Gifford & Moncreiff. Agents—Hamilton & Kinnear, W.S.

Ptn.—BRYSON *v.* LINDSAY.—*June* 6.

Sequestration—Examination—Re-delivery of documents to witness.

Application to Sheriff of Edinburgh, in the sequa. of Trowsdales, contractors, for redelivery to petr. of certain books and documents produced by him in his examination in the sequn. Bryson was a civil engineer, and the documents related to the making of the line of the Forgett Railway, upon which the bankrupts were contractors. The Sheriff-Substitute (Hallard) ordained the trustee, Lindsay, instantly to deliver the documents to Mr Bryson. The L. O. (Kinloch), in the appeal, recalled this deliverance, and remitted to allow the trustee such further time as might be

reasonable to examine or take copies of the documents, and thereafter to ordain them to be delivered up, reserving all questions as to the property of the documents. His Lordship had no doubt that a party producing documents under a statutory examination in a seqn. was entitled, by a summary application in the seqn. to have them ordered to be returned to him when the purposes of the statute served. The Sheriff was entitled to order production of documents without separate application and warrant. But such production was only for informing the mind of the trustee. The trustee reclaimed.

Lord President said—I am very clear on this point. I think the Lord Ordinary is right. Sec. 91 of the Bankruptcy Act, 1856, applies to this question; but it is also necessary to keep in view sec. 90, and the object of the statutory provisions as to examination. By sec. 90 the Sheriff is empowered to order examination of "the bankrupt's wife and family, clerks, servants, porters, law-agents, *and others;*" but for what purpose?—"who can give information relative to his estate." Sec. 91 provides that the Sheriff may order such persons "to produce for inspection any books of account, papers, deeds, writings, or other documents in their custody relative to the bankrupt's affairs, and cause the same, or copies thereof, to be delivered to the trustee." But for what purpose? For inspection. It would be monstrous to hold that a person, if ordered to produce his business books to inform the mind of the trustee as to the bankrupt's affairs, should be obliged to leave them in his possession, and go without the use of them, and have no means of recovering them out of his hands. If the law were otherwise than as the Lord Ordinary has held, this section might be wrested to most improper purposes, and made an instrument of oppression in the hands of the trustee. It would, moreover, defeat the purpose of the Act in these sections; for if this continued custody claimed by the trustee were allowed, no gentleman in the position of Mr Bryson would make any such production in any future proceedings. The list of documents here showed, on the face of it, that they were documents which were naturally and properly in the custody of the railway company.

The other Judges concurred, and the Court adhered.

Act.—Watson. Agents—Graham & Johnston, W.S.——Alt.—A. Moncrieff. Agents—Lindsay & Paterson, W.S.

SECOND DIVISION.

Susp. —Macintyre's Trustees *v.* Mags. of Cupar.—*May* 24.

Feu—Boundary by stream—medium filum.

The susprs. are proprietors of two lots of ground on which buildings have been erected, held in feu from the defrs. Both lots are described in the dispositions as "bounded by the Lady Burn on the south." The proprietors have used the Lady Burn for all ordinary purposes. It is liable to a good deal of pollution, though still used for domestic purposes, and the Magistrates were proceeding with operations to arch it over, which would have the effect of widening the street on the opposite side and bringing it up to the susprs.' boundary. The suspenders brought a suspension and in-

terdict, alleging that they could not be deprived of the use of the stream. The Magistrates pleaded that being within burgh, and as it was necessary for sanitary reasons to cover up the stream, they were entitled to do so. The L. O. (Kinloch) granted interdict, observing that he could make no distinction between the rights of the susprs. and any other riparian proprietor on a private stream; that no account could be taken of the sanitary considerations in the legal question; and that the fact of the subjects being within burgh, whatever its effect might have been, was not sufficiently established. The respts. reclaimed, but the Court adhered. The Lord JUSTICE-CLERK and Lord COWAN were of opinion that the susprs. had a right of property in the stream, *usque ad medium filum aquæ*. Lord BENHOLME held that the injury done to the susprs' feu by the archway complained of was itself sufficient to entitle them to interdict. Lord NEAVES thought the feuars had at least an easement entitling them to the use of the stream.

Act.—Advocatus, Duncan. Agents—Jardine, Stodart & Fraser, W.S. —Alt.—Sol.-Gen., N. C. Campbell, Agent—William Mitchell, S.S.C.

LANG *v.* BROWN.—*May* 24.

Post-nuptial Settlement—Mortis causa deed—Onerous and Gratuitous—Spes Successionis.

The late Robert Marshall and his wife executed a mutual post-nuptial settlement "to regulate their respective successions," by which the husband conveyed to the wife in fee all the property of which he should be possessed at the time of his death, and the wife, on her part, conveyed all the property of which she was or should be possessed at the time of her death to the husband in liferent and her daughter by a previous marriage, the pursuer, Mrs Lang, in fee, power of revocation being reserved to both parties during their joint lives. Mrs Marshall survived, and subsequently made a gratuitous conveyance of all her property to her sister, the defr., Mrs Brown. Mrs Lang brings a reduction of this conveyance, on the ground that the provision in her favour in the settlement of her mother and Mr Marshall was onerous and could not be defeated by a gratuitous deed, and that under it she was entitled to all the property of which her mother died possessed. The L. O. sustained this contention, and reduced the deed. The Court unanimously altered and assoilzied the defrs; holding that pursuer had no more than a *spes successionis*. The settlement of Mr and Mrs Marshall was only onerous in so far as it was mutual. When Marshall died, Mrs Marshall was free to dispose of her succession. It was absurd to read the deed as if Marshall had stipulated for the destination to Mrs Marshall's daughter. It was a *mortis causa* deed in that portion of it of a purely testamentary character, and could be revoked at pleasure. Had there been a *de presenti* conveyance in favour of the pursuer delivered to her, upon which infeftment had been taken, the case would have been different.

Act—Decanus, Mackenzie. Agents—Morton, Whitehead, & Greig, W.S., —Alt.—Sol.-Gen., Crichton. Agents—Duncan & Dewar, W.S.

MURRAY'S EXECUTORS *v.* CARPHIN AND OTHERS.—*May* 24.

Antenuptial Contract—Onerosity—Act 1621, cap. 18.

Mrs Johnston, who was entitled by her father's trust settlement to certain

funds at majority or marriage, became engaged to be married, and it was arranged between her and her father's executors that £400 should be uplifted from her share in her father's estate, to purchase furnishings for a house. She then, by a contract of marriage, conveyed to trustees the balance of her funds, that they might in the first place pay to herself the annual proceeds of it, and on her death to her husband, and, on the failure of both, keep it for the benefit of children to be born of the marriage. Mr Johnston, on his part, undertook reciprocal obligations. The parties were married 14th April 1863, and soon after the husband's estates were sequestrated. Mrs J. had made the necessary purchases in view of the marriage; but had expended about £900 in that way. Her father's executors, when they became aware of the amount of the debts she had contracted, and after having paid away about £150 of the appropriated sum, refused to make further payments, and brought a multiplepoinding to have the rights of parties determined. The tradesmen to whom Mrs J. had incurred debts prior to marriage, and the judicial factor, who came in place of the trustees who had failed, were parties to the process. The factor claimed the whole sum except the balance of the £400 appropriated to furnishings, as representing the marriage-contract trustees, to whom it was conveyed; and the other claimants rested their right to be preferred on the ground that Mrs J. had not by the marriage-contract effectually divested herself of the fee of the estate which she still held. The L. O. (Barcaple) sustained the the claim of the judicial factor to the capital of the fund conveyed by marriage-contract, and the Second Division unanimously adhered. It was then represented to the Court that a plea stated on behalf of the wife's creditor's had not been argued in the Outer house, and they asked a remit to the L. O. to hear parties upon it. The Court made the remit. The plea was that the conveyance in the marriage-contract had the effect of rendering Mrs Johnston insolvent, and that it was a gratuitous alienation under the Act 1621, c. 18, in favour of conjunct and confident persons without a true cause, and to the prejudice of prior creditors, and was also reducible as a fraud at common law. The L. O. repelled this plea, and of new preferred the judicial factor, on the ground that the creditors had no title or interest to reduce the marriage-contract, because the effect of their being successful would not be to carry the fund to them, but to open it up to the creditors of the husband by reason of the assignation implied in marriage. The creditors reclaimed, and maintained that the marriage-contract should be reduced, at any rate, that it should be reduced so far as the provisions contained in it were, in her circumstances, excessive. The judicial factor, on the other hand, argued that the trustees were not conjunct and confident persons, because they only represented children *nascituri*, who could not in any proper sense be called conjunct and confident, and that the contract was an onerous deed, and could not be reduced under the Act; further that its provisions were in every respect reasonable—£400 being a very fair sum to set apart for the purpose of buying furnishings, and the creditors having themselves to blame if they made advances without proper inquiry. The sum conveyed by the marriage-contract amounted to about £1200. The Court unanimously adhered, proceeding, however, on the onerosity of the deed, and not on the limited ground of title adopted by the Lord Ordinary. The Court said it was an altogether novel thing to attempt to reduce a marriage-contract under the Act of 1621, for which the only authority quoted was a *dictum* of Bell (Com. ii. 187) sup-

ported by reference to a case reported by Lord Gardenstone, where the Court had set aside an ante-nuptial contract of marriage so far as its provisions in favour of the wife were excessive. Lords Cowan and Neaves reserved their opinion as to the competency of setting aside an ante-nuptial contract, in a question with creditors, so far as its provisions were excessive, but agreed in sustaining the onerosity of the marriage-contract in question and its perfect reasonableness. The judicial factor was accordingly preferred.

Act.—Scott, Watson. Agent—A. Kelly Morrison, S.S.C.——Alt.—Gifford, W. A. Brown. Agent—John Henderson, S.S.C.

EARL OF WEMYSS *v.* MAGS. OF PERTH.—*May* 31.

Salmon Fishings—Artificial Embankment—Suspension—Possession.

Suspension and interdict at the instance of Lord Wemyss, to prevent the Magistrates of Perth from fishing for salmon from an embankment in the Tay between the right bank close to Elcho Pier and the island of Balhepburn. It was made in 1834 by commissioners, under statutory powers, for the improvement of the navigation, and to a considerable extent at the cost of the Earl, who is proprietor of the right bank at that point, and also of the island. The Magistrates have a royal charter, given effect to in a decree of the Court of Session, of the salmon fishings round and about the island, and which may at any time pertain to it. The embankment has diverted the channel of the river to the other side of the island, but it is still covered at high water. A peg has been fixed in the centre of the embankment, indicating the middle of the old channel, and no acts of fishing on the part of the Magistrates are alleged from that point westward to the mainland, and no right is maintained by them as to that portion. The Earl claims to exclude the respts. as being proprietor of the embankment, and also because he is entitled to follow the river, the fishings from the embankment coming in lieu of those from the right bank, which the embankment has destroyed.

LORD JUSTICE-CLERK thought the suspn. ought to be dismissed, as to the western half of the embankment, because no right to the fishings from it was maintained by respts. The suspr. maintained the remainder of the action, first, on the ground of property in the embankment. His Lordship desiderated proof of that right. The embankment had been made by commissioners under an Act of Parliament for public purposes. This was a navigable river. If the maxim *quod solo inædificatur solo cedit* were to be applied, the property would appear to reside in the Crown. Again, he considered the doctrine of accretion by alluvion quite inapplicable to such a case as the present, where a large embankment had been built all at once across the channel. Nor could the fact that suspr's. fishings from the right bank had been extinguished by a legal operation give him a right to fish from the new embankment. It might possibly give him claims of compensation against those who had deprived him of the fishings. If the fishing from the eastern half of the embankment were to be looked upon at all as an accessory to existing rights of fishing, it would rather appear that they belonged to the party who had the fishings from the island—namely, the respts. There was, therefore, a want of clear title in the suspr.; and that was sufficient to prevent him from succeeding in this summary process. He thought, however, that the Magistrates' title included these fish-

inga. They had the fishings all round the island. If a small island had sprung up where part of the eastern half of the embankment stood, it could not be doubted that they might have fished there; and, if so, did it make any difference that the embankment was artificial.

Lord COWAN concurred, but placed his judgment on a more limited ground. The respts. had right to the fishing from the island, which would sweep the ground where the eastern half of the embankment stood. Notwithstanding, if the Earl established a right of property in the embankment, it was possible he might exclude the Magistrates. To do so, however, he required to bring a declarator calling the statutory commissioners. The present was a possessory question. Action dismissed.

The other Judges concurred.

Act.—A. R. Clark, Balfour. Agents—Tods, Murray, and Jamieson, W.S.——Alt.—Fraser & Watson. Agents—Hill, Reid, & Drummond, W.S.

INSPECTOR OF POOR OF KILLEARNAN *v.* INSPECTOR OF POOR OF EDINKILLIE.—*June 5.*

Poor—Settlement—Forisfamiliation—Insanity.

A female pauper lunatic was born in 1810 in Edinkillie, resided with her father at Killearnan (where he had a residential settlement) till 1853, when she became insane, and was removed to an asylum out of that parish. She has remained insane ever since, and has never returned to Killearnan. The father died in 1858. The pauper became chargeable in 1860 on Killearnan parish, which now seeks relief from Edinkillie as the parish of birth. The Court held, as the pauper was a member of her father's family, not *forisfamiliated*, in 1853, her settlement then was his. During the ensuing five years till his death no change took place. Though she was absent owing to the state of her mind, she still belonged to the family, as an infant would, and was acquiring no independent settlement; nor did she acquire any new settlement after her father's death, as the statutory period had not elapsed between that event and the period of chargeability.

Defenders assoilzied.

Act.—Fraser, Johnstone. Agent—J. Galletly, S.S.C.——Alt.—Sol. Gen., Marshall. Agents—Mackenzie, Innes, & Logan, W.S.

HOUSE OF LORDS.

(In the Court of Session, March 7, 1865, 3 Macph. 609.)

DIGGENS *v.* GORDON.

Succession—Conquest—Husband and Wife.

Francis John Diggens married in 1860 Miss Mary W. Nisbet, eldest daughter of R. C. Nisbet, Esq., of Mainhouse. The parties had previously executed a marriage-contract appointing Gordon and others trustees of the marriage. The intending husband thereby assigned to the trustees a life-policy of insurance dated in 1854, for £200, and became bound to pay the

premium. This sum was settled on the wife and the child or children of the marriage. He also obliged himself to pay his widow £50 for mournings if she survived him; and assigned to her such household furniture, &c., as might belong to him at the time of his death. There were no other provisions by the husband in favour of the wife. Miss Nisbet assigned to the trustees some bank shares amounting to £250; and then followed this clause, "and the said M. W. Nisbet hereby further assigns, dispones, conveys, and makes over to the said trustees all sums of money, goods, gear, and effects, and heritable and moveable estates of every description, wheresoever situated, which she may conquest or acquire during the subsistence of the said intended marriage." And she assigned all sums of money then standing to her credit in the banks. The marriage took place, and on 2d Nov. 1863 the lady's father died, leaving a considerable fortune. By her father's marriage contract, he was bound to pay £3000 to the children of his marriage. Only two daughters surviving, Mrs Diggens was entitled to half that sum. Mr Nisbet, as regards the rest of his estate, which was considerable, died intestate.

The respt, the marriage contract trustee, claimed to hold all the share which Mrs Diggens thus succeeded to *ab intestato*, by virtue of the above clause in marriage-contract, subject to the trusts declared by such contract, in favour of the children. Mrs Diggens and husband claimed to have all this money paid over to them, absolutely free from the restrictions of their marriage-settlement; and brought this action against the trustee to have it so declared.

The L. O. (Ormidale) found in terms of the conclusion of the summons, but this judgment was reversed by the Second Division, who held that the words had not been used in the technical sense, but in a popular sense, and comprehended everything which the wife might succeed to during the marriage; and that this was clear from the fact that it was the wife who entered into the obligation, which was an unusual thing, and from the relative circumstances of the parties—the husband having no property, and the wife herself having nothing but her expectations. The pursuers appealed.

Lord Chancellor (Chelmsford) said the questions were whether the £1500 which the father of Mrs Diggens provided to her by his marriage-contract and deed of apportionment, and her share of the father's means and estate to which she succeeded *ab intestato*, belong to the trustee, as having been "conquested or acquired during the subsistence of the marriage." In the construction of every written document, whether a will or deed, words must, *prima facie*, be construed as bearing their ordinary meaning, and technical words must be construed according to the technical meaning, unless the context showed them to have some different meaning. Now, the word conquest is a technical word, and Bell (Pr. 1974) says that that word, "when used substantively in marriage contracts, comprehends whatever is acquired, whether heritable or moveable, during the marriage by industry, economy, purchase, or donation, but not what comes by succession or legacy. Now, the ordinary provision of conquest inserted in marriage contracts applies only to the husband's acquisitions, and it was said by Lord Cowan that such an obligation entered into by the wife was unprecedented, and no instance was recorded of a provision of the wife's conquest to the husband. No doubt a wife may during the marriage, by her musical or literary talent, acquire sums of money; but that is not in the legitimate sense conquest, for the money passes to the husband as a

matter of course. If the parties had clearly said that conquest was to be taken in its technical sense, of course it must be given effect to if possible; but the absence of any precedent of any clause in a marriage contract raised the presumption that the word had not been used in the technical sense at all. The word conquest in the present case was a verb, and Mr Bell implies (Pr. 1975) that when used as a verb it has a more flexible meaning. Since, therefore, it had a flexible meaning, it was important to see what were the other provisions of the contract, and when these were viewed they were found entirely inconsistent with the notion that this word could have had a technical meaning. Therefore the £1500 and the moiety of the intestate succession were vested in the trustee.

Lords CRANWORTH and WESTBURY concurred.

Lord COLONSAY concurred. This was an attempt to put an entirely novel construction on the word "conquest" in a marriage contract. There were things in the contract quite inconsistent with this clause working in the same way as a provision of conquest by the husband, and indeed it would be scarcely possible to work out the clause at all if the word were taken in the sense in which it is commonly understood in a provision of conquest by a husband in a marriage contract. It was clearly a mistake altogether to use such a word in connection with the wife.

Sir R. PALMER said the Court below, though deciding in favour of the trustee, did not give him costs.

Lord WESTBURY said it would be giving an undue encouragement to appeals if the House departed from the usual rule on this subject.

Affirmed with costs.

Act.—Att.-Gen. Rolt, Sir R. Palmer, Q.C., Anderson, Q.C.——Alt.—Gifford, Q.C. & Young.

PRINGLE *v.* BREMNER AND STIRLING.—*May* 6.

(Not reported in Court of Session.)

Reparation—Warrant—Wrongous Search—Wrongous Apprehension—Police Officers.—Amendment.

Pringle sued Bremner, chief constable, and Stirling, sergeant, in the Fifeshire constabulary, for damages. He averred that on 24th Dec. 1864 the defenders came to his house stating that they had a warrant to search it, and searched it accordingly; that they also searched his repositories, examined all his private books and papers, and seized and took away a number of the same; that they had no warrant for said search or seizure, and acted illegally and wrongously in making the same; that he could not specify the books or writings so taken away, as, though requested, the defenders had failed to give him an inventory; that the documents were still retained by the defenders; that thereafter, and on the same day, the defenders apprehended him and took him to the lock-up or police cells at Cupar, where he was detained by them till next day. The defenders narrated the circumstances of an outrage perpetrated at Dunbog Manse on 31st Oct. previous, by exploding near the house the iron bush of a cart-wheel loaded with gunpowder. They stated that the writers of certain anonymous threatening letters sent to Mr Edgar, the minister of Dunbog, whose settlement had been disputed, appeared to be concerned in the outrage; and they averred that a warrant had been obtained from the Sheriff-Substitute on

24th Dec. to search the pursuer's premises for pieces of the wood of which the plugs used in plugging the bush were made, and of the fuseo used in exploding it, and that in what they did they had acted under this warrant in the execution of their duty; and that they had shown the warrant to pursuer, and offered to read it, which he said was unnecessary. He denied that defenders exhibited or offered to read the warrant, and admitted that he did not interfere or offer to prevent the search. The defenders stated further that in searching for the articles mentioned in the warrant, they found papers which seemed to throw light on the sending of the threatening letters, and to implicate the pursuer in that matter; that they thought it their duty to take possession of these, and bring the pursuer at once before the Sheriff for examination. The pursuer denied that the papers were accidentally discovered; and stated that the defenders examined his papers and books at the very commencement of their search. The pursuer proposed issues (1) whether the defenders wrongfully and illegally searched his house and his repositories, and read and examined writings belonging to him or in his possession, and took possession thereof, and carried away several writings belonging to him to his loss, &c.? (2.) Whether they wrongfully and illegally apprehended and detained him? The defenders objected to the issues that they did not expressly state that the acts complained of were done without any warrant, that being the allegation on record. The Court of Session (1st Div.) held that there was ambiguity in the pursuer's statements; that it was not clear that an officer having a warrant to search for certain articles might not under that warrant secure others; that this would depend on the special circumstances; and they allowed the pursuer to amend his condescendence. According he added a statement setting forth that the pursuers, on entering his house, at once, and without farther ado, proceeded to search his writing desk and the drawers it contained, spent one or two hours in ransacking it, and that the whole search made by them in his dwelling-house consisted of the reading and examination of his said books, letters, and papers; that he was not aware whether they ever made any search in his workshop. The Court of Session found that there was no matter on record sufficient to support any of the issues proposed, and assoilzied the defenders from the conclusions of the action as laid. The pursuer appealed.

The Lord Chancellor (Chelmsford) said the defenders' plea of irrelevancy was in fact a demurrer, which, admitting all the facts, alleged that they did not show a sufficient ground of action. The pursuer's case alone could be looked at in considering this question, i.e., not merely his condescendence, but also any admission in answer to defenders' statements, which must be imported into, and made part of, his case. The condescendence seemed very clearly to state not only a trespass in breaking and entering the house, but also the imprisonment of the pursuer. His lordship would have felt little difficulty, if called upon to construe the averments, in coming to the conclusion that in the second article of the condescendence there was a double allegation, (1) that there was no warrant for the search or seizure, and (2) that in making the search there was an excess of any authority which might have been legally exercised. But it appeared to the Court of Session that there was an ambiguity, and they allowed the pursuer to add another article which was to be taken into account in judging of the relevancy of the case. Then in answer to the defenders' statement that there was a warrant, he says, Reference is made to the alleged petition

and warrant for their terms. It was said that this was an admission that there was a warrant in the terms of the one produced in process. This would be a very unjust conclusion to apply to such an answer. The warrant is the defenders' justification for the act alleged to have been done, and if a trial took place must be produced by them; and the "reference" only amounts to this that the pursuer having heard the defenders, at the time when they committed what he says was a trespass in his house, assert that they had a warrant, he does not deny that there was a warrant, and neither does he admit it, but puts it on the defenders to produce it at the trial. Can it then be said that there was not a *prima facie* case on the part of the pursuer? It may be said that the constable, having a warrant to search for pieces of wood and pieces of a fusee, had no right to go beyond that, to ransack the house and try to find something to implicate the pursuer in the crime charged against him. But supposing that in a search originally improper matters were discovered showing the pursuer's complicity in a crime, the officers, his lordship thought, would have been excused, he could hardly say justified, by the result of their search. It was not said there was any warrant at all for the imprisonment, but that the constable having made certain discoveries was justified in apprehending the pursuer. Again, the result would either justify or not justify him; if the papers seized really proved or gave a fair and reasonable ground to believe that the pursuer was implicated in the grave crime which was charged, then, though the officer might have no warrant for apprehension (and here he had none), yet the event would justify him, and he would protect himself by the circumstances afterwards discovered. That was the whole case. The issues were properly framed, and it was unnecessary to introduce the words that the acts complained of were done without any warrant.

Lord Cranworth concurred. It did not follow from the judgment that a constable had not authority to take a person into custody if he had probable ground to suppose that he had committed a felony.

Lord Colonsay said it was a very narrow question of pleading; and thought the pursuer's statements had been evasive. He did not so much regret the difference of opinion as nothing now done interfered with the proposition which was contested in the Court below,—that a constable in executing a search warrant for certain articles, and finding other articles that tended to implicate the party, and taking those articles and the party himself also into custody, is only acting in the performance of what may be his duty.

Reversed. Cause remitted.

Act.—Neish. Agents—Wm. Miller, S.S.C., and Adam Burn, Doctors' Commons.——Alt.—Decanus and Lee. Agents—Murray Beith, and Murray, W.S., and Loch and Maclaurin, Westminster.

Western Bank of Scotland *v.* Addie.—*May* 20.

(In the Court of Session, June 9, 1865.—3 Macph. 899.)

Company—Fraud—Restitution—Sale of Shares.

Appeals from a decision of the First Division disallowing exceptions stated for the appt's. to the charge of the Lord President at the trial of a cause in which respt. was pursuer and the appts. defenders. The question

involved was whether respt., as a shareholder in the Western Bank, was entitled to recover from that company the sum of L.26,000 and interest, money which he alleged that he had lost by reason of fraudulent misrepresentations of the bank contained in the reports of its directors inducing him to purchase certain shares. The circumstances of the case are stated in the report in the Court below. The jury returned a verdict for pursuers on both issues. (1) Whether the pursuer had been induced, &c., (and 2d) whether he was barred from repudiating the purchase. The appts. excepted to the ruling of the Lord President, on the ground that he had told the jury that "if the case should occur of directors taking upon them to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they had no reasonable ground to believe to be true, that would be a misrepresentation and deceit, and, in the estimation of the law, would amount to a fraud." The appts. contended that in order to entitle the respondent to a verdict under the issue sent to trial, it was incumbent upon him to establish either that the directors knew the statements in question to be untrue, or that they did not believe them to be true; in fact, that they were guilty of a moral fraud of a positive kind. They also excepted that the judge had not directed the jury:—1, That the pursuer was not entitled to repudiate the purchase on the ground that he was induced to make it by false and fraudulent representations as to the state of the bank's affairs made by the directors to the shareholders, of whom he was one at the time; 2, that if the representations were made in pursuance of the contract of partnership, and without fraud by the directors to the shareholders, of whom the pursuer was one at the time, the pursuer was not entitled to repudiate the purchase although the said representations were untrue in fact, and were fraudulent on the part of the manager; 3, that upon the evidence before the jury the action was not maintained in law, and the defenders were entitled to a verdict on the pursuer's issue; and 4, that upon the evidence before the jury the pursuer had in law barred himself from repudiating the purchase, and the defenders were entitled to a verdict on the counter-issue." The Court below disallowed these exceptions, and the present appeal was brought.

The Lord Chancellor (Chelmsford) said that the respt. sought the remedy of restitution *in integrum*, that is, that he should be placed in the position in which he would have been if he had never purchased the shares, and this on the ground that he was induced to purchase the shares by the fraudulent representations of the directors of the bank; and there was an alternative conclusion for damages. He also sought to have all transfers of shares to him reduced and set aside on the ground of essential error. The defr. set up defences, that the facts contained in the record did not form a relevant ground of action, that the statements made by the agents of the company were unauthorized and not binding on the company; and, moreover, that the statements were in fact made by the pursuer himself as a member of the company; that restitution *in integrum* was now impossible, and that the pursuer was barred by acquiescence from obtaining his remedy. Two questions arose—1, whether the purs. was originally entitled to rescind the contract for the purchase of the shares in question; and 2d, whether he was debarred of his right by the change which had taken place in the condition of the company at the time when his action was brought. Upon the first question, their Lordships had to determine how far a company is bound

by the misrepresentations of its managing body, upon which point there were numerous irreconcilable decisions. The distinction to be drawn from the authorities, and which was sanctioned by sound principle, appeared to be this:—Where a person was drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors in the name of the company sought to enforce that contract, or the person who had been deceived instituted a suit against the company to rescind the contract on the ground of fraud, the misrepresentations were imputable to the company, and the purchaser could not be held to his contract, because a company could not retain any benefit which they had obtained through the fraud of their agents. But if the person who had been induced to purchase these shares by the fraud of the directors, instead of seeking to set aside the contract, preferred to bring an action for damages for the deceit, such an action could not be maintained against the company, but only against the directors personally. Addie's action was for reduction of the deeds of transference of the shares, and alternatively for damages; but as he had brought it against the company it would follow from what had been said, that he could not recover unless he was entitled to rescind the contract. The question then arose—did the pursuer show, upon the statement of his case, that the false reports of the directors, and particularly the report of 1855, were the proximate and immediate cause of the purchase of the shares by him. It was not necessary that they should be the sole cause, for, to repeat what he had said in "Nicoll's case," (5 *Engl. Jur. N. S.* 205.) "Supposing that the reports of the directors formed a material part of the inducement to take the shares, without which the purchase would never have been made, I cannot think that the effect of them is destroyed because other influences were at the same time at work which contributed to the success of these false representations." But when fraudulent reports were made the ground for rescinding a contract for the purchase of shares, the fraud was not to be established by impressions received from those reports at some former period, however distant, but they should be clearly shown to be in the mind of the person at the time of the negotiations for the purchase, and to have been one of the causes leading to the contract. Apart from these reports there was no statement that any representations were made by the directors or by their authority to the pursuer; therefore, though this was a case in which, as the pursuer was seeking to rescind a contract from which the company had derived benefit, his action was maintainable, yet there was considerable doubt whether in his statement he connected the directors sufficiently with the alleged misrepresentations to make them imputable to the company, and whether he did not fail to state a relevant case upon the record on that ground. But on the question whether the pursuer was not deprived of his right to rescind the contract by the change in the character and condition of the company, which appeared from his own admission, there was no doubt that the relevancy of his case had altogether failed. Whether the change of the company from an unincorporated to an incorporated banking company for the purpose of more conveniently winding-up its affairs under the Joint-Stock Companies Act, 1856, so changed the nature and the character of the shares purchased by the pursuer as to render a *restitutio in integrum* impracticable was a question which, if it were necessary to determine, he should wish to consider more carefully. It was clear, however, upon the authorities, that after the crisis had arrived of the failure of the bank, and the order for winding it up had

been made, the time for rescinding the contract had gone. That was the ground of the decision in "Mixer's case" (4 *De G. and Jo.*, 575). It might seem to be a hardship on the pursuer to be compelled to keep the shares because, in ignorance of the fraud practised upon him, he retained them until an event occurred which changed their nature, and prevented his returning the very thing he had received; but he was not without remedy. If he was fixed with the shares, he might still have his action for damages against the directors, supposing he was able to establish that he was induced to enter into the contract by misrepresentations for which they were responsible. The first interlocutor appealed from, finding that the pursuer had stated on record matter relevant to entitle him to go to trial must, therefore, be reversed. The case, however, could hardly be left there, considering the proceedings that had since taken place. The issues approved by the Court were tried, and a verdict found for the pursuer. A bill of exceptions was tendered both on the ground of misdirection and non-direction. A rule was afterwards granted to set aside the verdict as contrary to evidence, and for a new trial. This rule and the bill of exceptions were argued at the same time, when the First Division disallowed the exceptions now appealed from, set aside the verdict, and granted a new trial, the latter of which interlocutors, by sec. 8, of the 55 G. III., c. 42, was "final and conclusive, and not liable to be questioned anywhere." In his charge the L. Pres. told them that if the case should occur of directors taking upon themselves to put forth in their report statements of importance in regard to the affairs of the bank false in themselves, and which they did not believe, or had no reasonable ground to believe to be true, that would be a misrepresentation and deceit. The defenders excepted to this direction so far as it related to the directors having no reasonable ground to believe the truth of the statements in the reports; and they also called upon the Lord President to direct the jury that upon the evidence before them the action was not maintainable in law, and the defenders were entitled to a verdict upon the first issue, and that upon the evidence the pursuer had in law barred himself from repudiating the purchase, and the defenders were entitled to a verdict on the second issue. The Lord President declined to give these directions, and the bill of exceptions which was tendered was refused. He (L. Chelmsford) agreed in the propriety of the interlocutor disallowing the exceptions. In the argument upon this interlocutor the case was put of an honest belief being entertained by the directors, of the reasonableness of which it was said the jury upon this direction would have to judge. But supposing a person made an untrue statement which he asserted to be the result of a *bona fide* belief of its truth how could the *bona fides* be tested except by considering the ground of such belief? And if an untrue statement was made founded upon a belief which was destitute of all reasonable grounds, or which the least inquiry would immediately correct, he did not see that it was not fairly and correctly characterized as misrepresentation and deceit. The exception, however, that the pursuer was in law barred from repudiating his purchase ought to have been allowed. One or two other points raised in the argument deserved a short notice. It was said that if the fraud was imputable to the company from the representations of the directors, as the pursuer was a shareholder at the time, the representations were his own as one of the company himself. This, in his opinion, was a fallacy, and could not be regarded as a valid objection to a suit in equity or in the Scotch courts on

the ground of fraud. Another objection urged against the right of the pursuer to be relieved from his contract was that it would prejudice the interests of other innocent shareholders who had acquired shares after the pursuer became possessed of those in question. In answer to this he would only observe that either these subsequent shareholders bought their shares under circumstances which compelled them to hold them, or else they also had been induced to join the company under false representations.

The judgment of the Court below was affirmed.

Lord CRANWORTH—The pursuer brought his action for restitution on the ground that he had been induced by fraud of the directors to purchase his shares; but relief of that kind cannot be granted unless where the parties are in the same situation as when the purchase was made; and the first question for the Court below was whether, assuming all the facts to be true, the pursuer was entitled to relief? The Court held that there was enough to justify issues for trial. Now, no trial ought on such a record to have been granted at all. Assuming that the company did, by means of false representations, through their directors induce the pursuer to purchase these shares, still he could not have restitution unless he could restore the shares. Now, this was impossible, for the company was at an end, and he himself took part in the proceedings to wind it up. It was not because the shares were depreciated in value that they could not be restored; but the shares were not merely depreciated, they were destroyed, therefore the time had gone by for such a remedy. All that was now competent was an action against those directors or agents individually who made misrepresentations. A company could not be sued in an action for a deceit, but only in an action to set aside or rescind the contract. Therefore, as no relevant case was stated in the record, no issues ought ever to have been sent to a jury, and the whole proceedings at the trial fell to the ground. With regard to the exceptions taken at the trial, he (L. Cranworth) thought the L. Pres. went beyond principle in part of his direction to the jury.

Lord COLONSAY, not having heard all the argument, took no part in the judgment; but recommended that such an interlocutor should be pronounced as might show that the case was at an end.

Reversed. (Note for Reference; Clark on Partnership and Joint Stock Companies, pp. 256, 725, etc; Journ. of Jur. June 1867, vol. XI., p. 299.)

Act.—Alt.-Gen. Rolt, Sir R. Palmer, A. B. Shand——Alt.—Decanus, Gifford, Balfour.

THE

JOURNAL OF JURISPRUDENCE.

PROPOSED APPOINTMENT OF QUEEN'S COUNSEL.

In the last number of the *Journal* some notice was taken of a proposal recently brought forward in the Faculty of Advocates, that an application should be made to the Crown to appoint Queen's Counsel at the Scottish Bar. Since then, the matter has been discussed in the Faculty, and a resolution in favour of the proposal passed, in circumstances which will be noticed presently. But as there has been, up to the present time, no indication that the resolution is to be at once carried out, and as a considerable number of the Faculty have recorded their dissent from the resolution, it may be useful to refer to the subject again, particularly as the motives of those who are opposed to the change have been impugned in no measured terms, by a writer in another periodical, who does not hesitate to speak of those who differ from him as actuated by "mischief, or officiousness, or jealousy," and who brands those who cannot see the matter in his light as "sunk in the lowest depths of bewilderment or unreasoning partizanship." Whether some bewilderment may not be excusable in those who take this writer as the exponent of the arguments in favour of the proposed change, will be seen in the sequel. In the mean time, it may fairly be asked whether language of this sort is in the circumstances either dignified or gentlemanlike. Such vituperation would not be tolerated if addressed by one gentleman to another, and it is difficult to understand the principle upon which it is to be considered allowable when anonymously uttered in reference to a number of persons, who at least are entitled by their professional status to be treated as gentle-

men, and who in this matter are manifestly free from party feeling, as they have the misfortune to be opposed to the leaders of both sides of politics. The writer referred to does not hesitate to make the assertion that the resolution in favour of the appointment of Queen's Counsel was carried by a "considerable and influential majority," and characterises the proceedings of those who have dissented from the resolution, as "a capricious attempt to frustrate it." It is right, therefore, that the exact state of the facts should be made known to those members of the Faculty who were not able to be present at the meeting, and also to those, whether members of the other branches of the legal profession or of the general public, who may be misled by these statements. In the first place, the meeting itself was held during the sitting of both Outer and Inner House, and many of those who have the best title to the word influential were therefore necessarily absent when the vote was taken. In the second place, the meeting itself was not a large one, and there was no intimation of it to those members of the Faculty, who though not directly practising at the Bar, have yet a right to be consulted and allowed an opportunity of giving their vote on any question of such vital importance as to involve a total change of the constitution of the Faculty, and a surrender of the rules of precedence into the hands of the Crown. But further, it is not to be forgotten that at an early period of the meeting it had become apparent, that though there was a difference of opinion in the Faculty as to the propriety of the resolution, in so far as it proposed to invite the Crown to appoint Queen's Counsel generally, there was an all but unanimous feeling in favour of memorialising the Crown to grant precedence, either by appointment as Queen's Counsel or otherwise, to the law officers and ex-law officers of the Crown; and that it was distinctly intimated from a quarter, which entitled those who heard the intimation to believe it to be made by authority, that if there was difference of opinion on the matter, the resolution would be withdrawn in favour of the more limited proposal. It is not improbable that some of those who were against the resolution, but in favour of the limited proposal, may have left the meeting on the faith of this apparently authoritative statement, and in the knowledge that they left behind them a sufficient number of members to represent their views, and so to secure the withdrawal of the resolution. Yet, strange to say, when the vote had been taken, and the resolution carried by the

"considerable" majority of 10 votes, in a meeting consisting of about half the number which usually assembles to elect a professor for a law chair, the virtual engagement made to withdraw the resolution was not carried out, and those who formed the minority were told that the resolution would be at once forwarded, and the appointment proceeded with. In this state of matters, it is rather bold to accuse those who are opposed to the resolution of "a capricious attempt to frustrate it."

But whatever may have taken place at the Faculty meeting, this at least must be confessed, that those who spoke at the meeting had the good sense to deal with the question in a practical straightforward manner. Indeed the question is so eminently a practical one that it could scarcely have been supposed possible to make it the subject of such absurdly grave philosophical statement as the following, which comes from the same pen from which the polite and tasteful abuse, which was formerly noticed, emanated: —"It is peculiarly the duty of a body like the Faculty of Advocates to create within itself conditions that are favourable to lead its members into courses that accord with the general feeling of the Faculty, and with the true interests of the profession. Laws without personal reciprocation may be of little value, but there can be no organic existence without them, and if the practice of the Bar ever come to be regarded as a mere competitive field where the prize striven for shall be the mere filling of purses, by any means not in themselves unlawful, the funeral day shall have come of all those admirable qualities that have given to the Bar not only a name and a history, but have secured the beneficial influence which it still exercises over the institutions of the country." Such stuff as this, if printed only in the report of a meeting, followed by the inevitable "Cheers," perhaps with the addition of "and laughter," might not be very objectionable. But it is really too much of a good thing that such quasi-philosophical ungrammatical rhodomontade, should be deliberately composed and published in leading article type in any sober professional journal. What the exact meaning of the first sentence may be, it is not very easy to discover. It seems to amount to this that such bodies as the Faculty of Advocates should provide hooks for the noses of their members, by which they may drag themselves, or be dragged in any direction which "accords with the general feeling of the Faculty." Probably the true explanation of the meaning of the writer is to be found in a former

article in the same journal—"In the days when 'rattening' is so much in fashion people would do well to respect the conditions of their craft;" this *Broadheaded* intimation being followed by the announcement that "the adoption of the resolution which is now before the Faculty would do much to remove *the temptation to offence and the necessity for punishment.*" Thus it would appear that it is thought advisable to constitute the Faculty into a sort of trades-union, which shall make "conditions within itself" for the purpose of preventing men from acting as either senior or junior when employed by the other branches of the profession, except according to prescribed rules, just as the existing unions insist that no shop shall do journeyman work cheap by keeping too many apprentices. On the question whether this is a legitimate object of "creating conditions within" the Faculty itself, a word or two will be said presently. But is it not evident that what it is proposed to do, is the very reverse of the Faculty "creating conditions within itself?" It is giving the power into other hands to prescribe absolutely the condition in which each member of the Bar shall stand to the rest. By getting the Crown to appoint Queen's Counsel, the Faculty would virtually place the right of giving precedence to one counsel over another, for ever out of the reach of the Faculty itself. It is no answer to this to say that there is no ground for entertaining the belief that the Crown, in exercising the prerogative, will ever do so capriciously, or for political considerations. Apart from the fact, that both in England and Ireland experience has proved the reverse, this is only to express a confidence, well or ill founded as it may turn out, that power voluntarily yielded to another will not be abused. But it in no way alters the fact, that any request to the Crown to appoint Queen's Counsel, is the very opposite of the creation of a condition by the Faculty within itself, and is a direct yielding up, to a greater or less extent, of the independent power of the Faculty to control its own affairs and regulate its own precedence. This grand philosophical flourish, therefore, being absolutely inconsistent with itself, can give but questionable aid to the proposal, and it is charitable to believe that of those who voted in favour of the resolution, none were actuated by a ground so flimsy,—probably not even the writer himself, who, it is more likely, thought out this wonderful theory after the vote, just as a bad Act of Parliament, after it has passed, is bolstered up by

brilliant or would be brilliant writing in the newspaper organs of the party that brought it forward.

Dealing with the matter in a practical manner, it is necessary to consider separately the question of precedence in the House of Lords, and the question of the regulation of the Scottish Bar at home. As regards the House of Lords, nothing can be more certain than this, that in 19 cases out of 20, it is the law officers or ex-law officers of the Crown who alone are interested in the matter, so far as precedence is concerned. It is undoubtedly to be regretted that an ex-Lord Advocate or Solicitor-General for Scotland should be postponed to *every* Queen's Counsel in the House of Lords. But this is not so, as regards the rest of the bar. Where English Counsel are retained in Scotch Appeals, they are almost invariably Counsel of the very highest standing, who even if there were Queen's Counsel at the Scottish Bar, would necessarily lead them, from the priority of their patents. Let any one look at the reports of Scotch Appeals, and it will be seen at once that the senior Scottish counsel employed are almost always the existing or ex-law officers of the Crown, and that where Queen's Counsel are employed they are invariably of long standing,—such standing that no counsel at a limited Bar like that of Scotland could be expected to have a patent of earlier date, unless he were, or had been, a law officer of the Crown. So that, practically, there is no hardship now, except in the single case which all are agreed should be remedied, unless it be a hardship that Scottish counsel are not allowed to decorate themselves with silk, and to make themselves hot and uncomfortable by wearing bottom wigs. But it is probably safe to predict that whenever the question is reduced to one of mere dress, the good sense of the Faculty will avail to prevent the step being taken. This then disposes of the question in its aspect as regards the House of Lords. Except in very rare instances indeed, the present system, modified by the granting of patents to the Crown officials and ex-officials, could not fail to work well.

But it is upon the much wider question of the advisability of a general appointment of Queen's Counsel from the Scottish Bar, with a view to affect the business of, and practice in, the Supreme Courts of Scotland, that the argument chiefly turns. It is maintained by those who advocate the change, that it would be of great advantage if members of the bar whose abilities adapt them to act as leaders, should be placed in a position to lead other counsel,

who though their seniors in the profession, find junior practice more congenial and better suited to their particular talents, than senior practice. Some even go the length of maintaining that to appoint Queen's Counsel would be an advantage, as aiding to prevent advocates of long standing from doing both junior and senior work, by drawing a stricter line of demarcation between senior and junior practice. The objectors on the other hand maintain that it is at least extremely doubtful whether the adoption of the proposal will so effectually attain the objects in view, as to counterbalance the many arguments against the proposal. They argue that to invite the Crown to interfere with the Faculty's freedom to regulate its own practice is a hazardous experiment, as there never can be any guarantee that politics or personal bias will exercise no influence in the matter. They maintain that though seniority may be an unsatisfactory test of leadership, it is at least natural and free from invidiousness, whereas if precedence were regulated by the dates of patents conferred by the Crown, there could be no limit to the possible abuse of the power. Farther, they say with much truth, that in so limited a Bar as the Scottish, the risk of creating endless heartburning and dissatisfaction could only be prevented by conferring the distinction on all those who sought it, in which case it would at once cease to be a distinction, as all those would naturally seek it who had been long at the Bar without practice, or who were independent of practice. Thus as far as distinction is concerned, it might become with many a mere question of personal decoration and affectation of superiority.

It must be admitted that, assuming it to be true that what is objectionable in the rules of precedence at the Scottish Bar can only be remedied by the introduction of the Queen's Counsel system, there is a great deal to be said on both sides of the question. But it may be asked whether there is no other way of effecting the objects of the promoters of the proposal, than by inviting the Crown to appoint Queen's Counsel, and running all the risks of abuse of the power which the Bars of the sister countries manifest, and which if committed in so small a body as the Faculty of Advocates would be doubly injurious. Is there no way by which the Faculty can so regulate its own procedure as to attain the desired results, without the attendant disadvantages and risks? It is thought that upon consideration it will be found to be quite easy for the Faculty to prescribe to its members a few simple rules, by which all that is desired would

be accomplished, without any risk of heartburning or invidious distinctions. Let it be made the rule of the profession that any advocate who gives up writing pleadings shall formally intimate that fact to the Dean of Faculty and his council, and that thereafter such advocate shall be entitled to lead all those who still continue to write pleadings. Further, let those who have given up writing take precedence, not by the date of their giving up writing, but by their seniority as at present. By these simple rules, the present difficulty that no counsel can be led by one who passed the bar after him would be entirely obviated, while all ground for jealousy or ill-feeling would be removed. The responsibility of taking the step from junior to senior practice would rest entirely with each advocate himself. And it would undoubtedly be a great advantage to those who, though of longer standing, were yet more suited for the other class of practice, that the number of those with whom they could act as juniors, should not be so limited as it is at present. On the other hand no young advocate could be capriciously passed over the heads of those who were his seniors in years and standing. If any counsel was dissatisfied that one younger than himself was in senior practice, and therefore entitled to lead him, the remedy would be in his own hands. By taking the same step of giving up writing, he could at once resume his seniority. If not prepared to take that step, he could have no reasonable ground for complaint. On the contrary, as long as he chose to continue to act as a junior counsel, the greater the advantage to him that those who employed him should have the entire field of seniors from which to choose a leader. At present if a W.S. or S.S.C. selects a counsel who has been long at the bar, and who may be invaluable for junior work, though unsuited for senior, he is hampered by this difficulty, that when he comes to require a senior, he is limited in his choice to three or four individuals. This is highly inconvenient, and cannot fail to affect the practice of those counsel who are naturally best suited for junior work, whenever they attain "a certain age."

By this means, without any invidious distinctions between stuff and silk, plain wigs and big wigs, seats within the bar and seats without the bar, and above all, without surrendering the independence of the bar, and running the risk of power ceded being abused or injudiciously exercised, all the present anomalies of practice could be got rid of, and the position of senior and

junior placed on a simple intelligible basis, allowing each man calmly and without haste to judge what position he should take up, and to act on his own responsibility. If such a change were made, it may be that after all had been done experience might shew that it would have been better to let matters rest as at present. But even in that case, it would be more endurable that the error should be that of the Bar itself, and within its own power to remedy, than that it should find itself by its own act, hopelessly given over to a power from without, the interference of which it had itself invoked, though powerless to control it when once set in motion.

A BRITISH CODE.

Sir Thomas Craig in his prefatory address to King James I., after congratulating his Majesty upon the happy union of the two crowns, proceeds—"Haec autem adunatio sive conjunctio ut solida esset et suis omnibus numeris absoluta, conventum etiam jurisconsultorum utriusque Regni dudum instituisti, qui de legibus utriusque populi inter se sermones conferrent, et in quibus convenirent et dissiderent despicerent, si fieri possit ut in utroque eaedem leges iidemque mores observentur." He wrote his book, as he says, for the purpose of removing the common error that the laws of England and Scotland were fundamentally different, and after comparing them he declares that he found them to have "maximam inter se affinitatem" —a conclusion which will not be contradicted at the present day. The proposal for the assimilation of the laws of the two countries remains, however, much where it was in Sir Thomas Craig's time. Nor is it to be much regretted that two centuries have passed since the change was first mooted. Laws cannot be altered as one shifts his coat, and the memory of recent hostilities between the two countries was too fresh to allow of the adoption of the same *leges et mores* at once. But the time that has passed since our James VI. went to England as king has been fruitful in a silent assimilation of the interests, manners, and customs of the two countries. They have become substantially one nation, welded together by a history which is neither English nor Scotch. The "mores" have now become so similar, that there is at length rational foundation for an assimilation of the "leges."

That the two countries have gained much by the preservation after the Union of their respective peculiarities in customs and laws cannot be denied. But it is not desirable, and if desirable it would not be possible, that such national distinctions should be perpetually kept up. In the give and take of constant intercourse for two cen-

turies it was inevitable that the peculiarities and prejudices which kept Scotland apart from England should be rubbed off. Our national character has entered into the common stock which makes up the greatness of Britain. It is now time that our laws should follow our customs, and that the two countries should be united under a common legislation, as hitherto under a common legislature.

Excepting, possibly, the Wallace Monument Committee, most Scotchmen would willingly see some arrangement to render men's legal rights the same in Midlothian as in Middlesex. It strikes the outer world as somewhat absurd that to the Queen's Courts in Scotland an Englishman is still as much a foreigner as he would have been immediately after Flodden. And of course the Queen's Courts in England view all Scotchmen and even Scotch tribunals as foreign too. Hence endless bickerings and practical inconveniences. But lately, as our readers must remember, the English Courts were in the habit of impounding Scotch wards trusted by their simple tutors or curators in an English school. The Marquis of Bute's case has, however, after much serio-comic debate, done something to settle the exercise of the rival jurisdictions upon the basis of the benefit of the ward. Time would fail us to tell of adventurous youths and maidens fleeing from paternal frowns to the ready aid of the Scotch smith at Gretna, of debt-laden barristers trying the effect of the Scotch sequestration law, and of happy pairs seeking the benefits of a Scotch divorce. It is the commercial classes who have chiefly felt the evils of the existing dissimilarity of laws. Once across our ancient border line, their steps are at every moment surrounded by legal pitfalls, against which their previous local experience in business is no protection. Mercantile men accordingly have long demanded a uniform law for both countries. They have now obtained a code for all British shipping, and they have got a Mercantile Law Amendment Act, and a Companies' Act; but these are only alleviations. Our English neighbours, on the other hand, have got our Divorce Courts, and something like our registers for deeds—both rather spoiled in the stealing, and no thanks given to the inventors. They are about to take openly our Bankrupt Law, and it is understood the Marriage Law of the United Kingdom is to be made the same at some future day. But after all, though our laws are becoming assimilated, it is in a truly British hap-hazard style, and at a pace which may perhaps lead to the goal in about a century.

If we are convinced that, after a preparation of more than two centuries, circumstances are at last ripe for legal assimilation, there are but two obstacles to our immediate enjoyment of the fruits of this long time of waiting and growth. These are—(1.) The neglect of legal reformers to set up the proposed assimilation as a definite practical object for their labours. (2.) The mutual ignorance which prevails among those engaged in the administration of each system of law respectively regarding the merits or demerits of any law but their own. How, then, are these difficulties to be overcome? We

think that for this purpose an extremely favourable opportunity has arisen in connection with the report of the Royal Commissioners upon the expediency of a Digest, recently published.

The Commissioners propose in the first place to ascertain what the law of England is. That law is scattered, as they tell us, through 45 volumes of statutes, and 1300 volumes containing judicial decisions and dicta in some 100,000 cases. Such is the chaotic pile which forms

> "The lawless science of our law,
> That codeless myriad of precedent,
> That wilderness of single instances."

It is no severe reproach to Scotch lawyers that they are baffled in projects for assimilation by their ignorance of this tangled forest of English growth. The first thing, then, the Commissioners say, is to reduce this mass to order, and to present it in the approachable form of an authoritative Digest. For this task—cloacas Augiae purgare—they anticipate that several years will be required, and we doubt not they are right. But when the Digest has been framed what will they do with it? Having ascertained by it what the existing law really is, they propose to make it a basis for alterations and amendments whence may result a code for England.

It is here, we think, from our Scotch point of view, that the plan is defective. We are so heartily convinced of the benefits of a code, that we should like to see a code, not for England, but for Great Britain; and this we think is the ultimate object to be kept in view in proceeding with any project for a digest. If a limited plan of a code for England alone is adopted, there is an end of all prospects of assimilation of the laws of the two countries upon fair and equal terms. If a code for England alone be once accomplished, there is an end of Scotch law—an end, not by absorption into an imperial whole, but by throwing away as worthless all that Scotch thought and experience have effected in jurisprudence. The code of England once made, few people would think of perpetuating the differences between the two countries by establishing a separate code for Scotland. The desire for assimilation still remaining, the natural and almost inevitable result will be a wholesale extension of the English code to this country, without much modification.

This is not the assimilation which we desire. We think that Scotland has much to give as well as to receive. This country has worked out its problem of civilisation and jurisprudence distinct from, though side by side with England. Never were there better materials for codification than those which are offered by a comparison of the different results and different processes for attaining the same result which, in not widely different circumstances, the laws of England and Scotland have adopted. We should like to see a code for Britain and not for England alone, and as preparatory to that great reform we deem it mere wanton waste to throw away the valuable suggestions which would be afforded by an impartial comparison of the laws in both parts of the island.

A British code is the great end to be arrived at; and with that in view the proper course is to prepare Digests of Scotch and English law simultaneously.

If these were both completed, assimilation by means of a common British code would be comparatively easy. The lawyers and the people of each country would have in their hands an authoritative exposition of their neighbours' law which would remove the great obstacle of mutual ignorance. Our English fellow-countrymen would perhaps discover that the jurisprudence of Scotland is not quite so barbarous as it is occasionally made to appear in the court of last resort. We on our part would perhaps find that the law of England is not in all respects so technical and confused as it sometimes appears to us at present. Both parties, too, we doubt not, would discover that many differences which now seem insuperable exist more in name than in reality. After removing some of the antique dress with which land rights in both ends of the island are still enveloped—a divestiture which we are already contemplating in Scotland—a common basis would easily be found upon which might be built a code for Great Britain.

We do not discuss in this paper the propriety of codifying the law. Indeed we do not know how the argument in its favour can be better stated than in the words of the Commissioners: "It is, as we conceive, a duty of the State to take care that these laws shall, so far as is practicable, be exhibited in a form, plain, compendious, and accessible, and calculated to bring home actual knowledge of the law to the greatest possible number of persons. The performance of this duty—a duty which other countries in ancient and modern times have held themselves bound to recognise and discharge—has in this country yet to be attempted." These words we think carry conviction with them on the question of having a code. We wish only that the code which is to be framed shall extend over the whole island. It rests with Scotch members of Parliament at present to see to this, and prevent the absurdity of a partial code for either country alone. It is for them to see that preparations be made in Scotland for a union of the laws, and that upon terms no worse for us than the previous union of the kingdoms.

R. V. C.

CURRENT CASE-LAW.

We propose in future to give brief notes of the results of the more important decisions of the Court during the month. At present we have space for only a few of these. Some of the more important cases of the session will be dealt with in our "Notes in the Inner House," which we hope to be able to resume next month.

Of late years there has been an increasing number of cases involv-

ing nice questions as to the effect of wills, or conveyances from the dead to the living, by means of cheques and deposit-receipts. *Morris* v. *Riddick*, 1st Division, July 16, was a very instructive case of this kind. A person, in contemplation of death, handed to his friend a deposit-receipt, blank indorsed, and on a subsequent occasion he also handed to him the bank notes which the donee had obtained for the receipt, and which he had given to the testator—a condition being added, on both occasions, that if the giver recovered from his illness the money should be returned to him; but if not, it should be the absolute property of the donee. The transaction was conclusively proved by the testimony of witnesses; but, the giver having died, his executor claimed the money as part of his estate, and contended that the alleged gift was merely a legacy, and, being above the amount of £100 Scots, could only be constituted by writing; or, if not a legacy, that it was a *donatio mortis causa*, and fell under the same rule. The Court unanimously adopted the view that it was a *donatio mortis causa*, but was not subject to the rule that applied to the constitution of legacies. It was held that, as property in moveables is transferred by mere delivery, which may be proved by parole, there is no reason for applying a different principle where a condition is adjected—viz., the condition that the gift shall be revocable, and shall revert to the granter if he recover from his illness. The actual delivery was held to come in place of the writing necessary to constitute a proper legacy. The differences between a *donatio mortis causa* and a legacy, on the one hand, and an absolute donation on the other hand, were very clearly explained in the opinions.

A litigation (*Greig* v. *Simpson and Miles*, 19th July, 1st Division) between the parishes of North Leith and South Leith fixes by a judgment of eleven judges out of the whole Court, that a seafaring man who rents a house for his wife and family, to which he himself returns at the conclusion of his voyages, may thereby acquire a residential settlement, under the Poor-law Act, in the parish in which the house is situated. In this case, the pauper's absences on foreign voyages were numerous and protracted, and the question was raised very purely, whether a settlement can ever be acquired except by *personal* residence? The answer which has been given, that, at least in such an exceptional employment as that of a sailor, it may be so acquired, is not easily reconciled with some former decisions (especially *Inspector of Kelton* v. *Inspector of Tongland*, July 6, 1866, 4 Macph., 1033). The Lord President, who dissented along with Lord Benholme, said that the judgment of the Court introduced a very bold method of construing the statute; and cautioned the Court against being misled by sentimental considerations, pointing out that a pauper has really no interest in the question what parish is bound to maintain him. This decision, however, of the whole Court must be held, unless the case goes to the House of Lords, and is reversed there, as overruling the previous cases, and introducing a somewhat novel principle into the law of settlement.

The case of *Hamilton* v. *Turner and the Monkland Iron and Steel Co.*, July 19, 1st Division, is an important contribution to the law which governs the relation between mineral tenants and those who have rights upon the surface of the ground. It shows that the former are not at liberty to work their minerals so as to injure buildings erected on the surface *subsequent* to their leases, unless, indeed, these buildings are of an unusual character, such as cannot be fairly erected by a proprietor who has let the minerals under his land. The judgment in *Rogers' Trustees* v. *Rogers* will be referred to hereafter as a leading authority in regard to the nature of a mixed liferent of heritage and moveables. The Court there decided the principles on which the executor of a lady, whose husband left her a liferent of a farm and all the farm stocking, was bound to account for the stock which she received at the beginning of the liferent; holding that the liferentrix was bound to keep up the stock, but that the difference between the stock at the commencement and at the close of the liferent was not to be too nicely gauged. The difference must be palpable and well marked, in order to entitle the liferentrix's executor to recover against the fiars, and *vice versa*.

Reviews.

Lectures on Conveyancing. By the late ALEXANDER MONTGOMERIE BELL, Writer to the Signet, Professor of Conveyancing in the University of Edinburgh. In Two Volumes. Edinburgh: Bell and Bradfute.

WE come to review these ample and well filled volumes with a painful interest, for they are the result and the monument of labours which shortened the life of their author. The Conveyancing Chairs of Scotland have not of late years contributed to the longevity of their occupants. Professor Menzies and Professor Bell both died in the prime of their powers and in the midst of their usefulness; and but the other day we had to lament the retirement of Mr Kirkwood in bad health from the professorship in Glasgow which he has so well inaugurated. Mr Montgomerie Bell was inferior to none of these admirable men in ability and scholarship, in thorough knowledge and understanding of his profession, or in zeal in communicating his stores of learning and developing the powers of his students; and it is no disparagement to them if we express our opinion that he was, if possible, superior to them, as he was to most men, in conscientious care and pains-

taking, earnest, exhaustive industry. In business as well as in conducting his class this was the prominent feature of his character. It was this that most strongly impressed those who were brought into contact with him, whether as students or in the office; and next to the high and honourable tone of professional duty, (of which, indeed, it was a part), this care and industry was perhaps the most valuable lesson which the young lawyer could learn from him.

The first of the volumes before us has, we believe, been in the hands of the students of the Conveyancing Class during the last session, and has thus been in some measure known to the public; but the work as a whole is only now published. We cannot hesitate to say that it is by far the most useful and trustworthy guide in the ordinary business of the lawyer's office which has yet been produced. Menzies's Lectures will not readily be superseded; for they have taken their place as a work of considerable authority, and they are full of independent thought, useful learning, and sound sense. But as their author left them, they do not include the great changes effected by the Titles to Land Acts of 1858 and 1860, and however accurately the results of these statutes may have been added by the skill of able editors, the paragraphs relating to them form no part of the book, they are but appendages, convenient enough, but not pretending to or possessing equal value and authority. One of the chief recommendations of Professor Montgomerie Bell's book will be found, if we are not greatly mistaken, in the complete and exhaustive view which it gives of our whole system of land rights as modified by recent statutes. In another respect this book differs somewhat from that of Professor Menzies. It contains, indeed, like its predecessor, many chapters which are rather valuable legal treatises than lectures on conveyancing; but its chief end is to be a guide for *the office*, if we may so say, rather than to the mere conveyancer; and this purpose is kept steadily in view throughout. Page after page is filled with clear and copious directions for every emergency in the business of the practising lawyer; and these directions are drawn, not merely from a careful study of the decisions of the Court, but also evidently from the most anxious consideration of the various questions which occurred to the author in a long and extensive experience. He is not content with merely stating difficulties, but always tries to furnish the student with the key to their solution.

The book has been edited with the most pious care. We are informed in the preface that "from the author's habit of carefully revising the Lectures and adding to them all necessary references to new Statutes and Decisions—a practice which he continued till the beginning of the present year,*—the work of preparing them for publication has been very simple. Some merely verbal alterations have been rendered necessary by the references to Decisions, which were incorporated in the manuscript with the text of the lectures, being now given in foot-notes; and a few references to Decisions of the present year have been included in the notes." The labour of editing, however, cannot have been small, for we have the most valuable and complete indices we remember to have seen, extending to 170 pages, adding tenfold to the value of the book as one for occasional reference. There is only one omission which we hope will be rectified in the second edition. In the footnotes the cases are cited by the names of the pursuers only. We need not say that the ready identification of the various decisions is of some importance to the reader, and that in a book of this kind which will be referred to almost daily by the man of business, time and trouble would often be saved in turning up reports or referring to the index of cases at the end of the book, if the full designation of each decision were given. It is, however, a proof of the great merit of the book and of the careful manner in which it has been prepared for the press that we have only been able to find so small a blemish.

It would be entirely out of place to fill our pages with large extracts from such a book as this. We shall give but one quotation as an example of the exhaustive manner in which Mr Montgomerie Bell went to work. It is an instance of his suggesting and answering a question which is hardly mentioned by any other writer in the law of Scotland, and his answer to which was adopted by the First Division in a case decided this Session—(*Colquhoun* v. *Walker*, *May* 17, 1867, *ante*, p. 325).

"Connected with the prohibition to subfeu, there is frequently introduced a condition that the disponees of the vassal shall enter as vassals with the superior, and pay composition, within a fixed period after the date of the conveyance in their favour. To the effect of enabling the superior to enforce the pecuniary stipulations, it follows, from the opinions of the Judges in the case of Coutts, that the prohibition is valid, and (after a breach) can be made operative by refusal to give an entry to a disponee acquiring from the contravening vassal, or to the heirs of such vassal. Nor does it seem to admit of a doubt that a clause of irritancy would, for the same object, be enforced by the Court. Beyond this, it would probably be held that the superior has

* The Preface is dated Nov. 1866.

no interest, and consequently no title, to enforce such an irritancy. The result seems thus to be that a prohibition to subfeu, though validly made real, would not be extended against a conveyance in ordinary form containing an obligation to infeft by two manners of holding, the one, of the granter's superior (which is consistent with the prohibition), and the other, of the granter himself (which is inconsistent with it), so as to enable a superior to maintain that the terms of such conveyance were a positive breach of the condition and ground of forfeiture of the feu; such prohibition would only authorise the superior to enforce an entry and payment of the stipulated composition. The conveyance, in such case, would be held, *quoad* the superior, as containing only an obligation to infeft to be holden of the superior in terms of the feu-right. I think the superior's rights, in this particular, would go no further than as here stated, because conveyances with the double manner of holding are not intended to create subfeus, but, on the contrary, to be confirmed by the superior when the proper time to obtain confirmation comes.

"When the prohibition to subfeu is accompanied by an irritancy, it is not safe, and certainly not usual, to rely on a disposition with double manner of holding, and sasine thereon. In such case the purchaser should always enter with the superior. And, even if there is no irritancy, yet if the condition has been made real, it appears unsafe to rest upon a conveyance, though containing double manner of holding, and registered or completed by infeftment, without obtaining the superior's confirmation. The only ground on which such a title can be secure in itself is that it constitutes a fee holden of the disponer. As it is intended to be confirmed by the superior, so as to evacuate that fee, which is a subfeu, the superior himself appears to have no interest in objecting to the title, simply because it contains the alternative manner of holding, and is not confirmed; but supposing the last vassal fraudulently to grant a second conveyance to a third party dealing with him in *bonâ fide*, or to grant a heritable bond, and supposing the second disponee or the creditor to obtain a charter from the superior, I do not see how, in a question with such third party, the first disponee could found upon his title, with double manner of holding, to any effect, and could complete his title and exclude such third party. His right, as a holding of the disponer, is a subfeu, which is prohibited; as a holding of the superior, it is valueless until confirmed; and the superior, if he has granted confirmation of an absolute disposition, cannot grant a second confirmation of a right of the same nature; and, if he has granted confirmation of a limited right in security, his second confirmation can only be granted under the burden or exception of the first. It is proper, therefore, that, in all cases where the prohibition to subfeu is made a real condition of the feu, confirmation be obtained by every disponee from the superior. A provision intended for the protection of purchasers, in connexion with the prohibition to subfeu, is inserted in the Titles Act of 1860, s. 36. But it is liable to be defeated in the case of second sales to *bonâ fide* purchasers, as shall be afterwards explained (p. 580)."

Papers printed by the Society of Law Clerks of Dundee.

(Privately Printed.)

It appears from the preface that the papers here printed are the first and the last of a series of papers read before the Society of Law Clerks of Dundee during the session 1866-67, being the first session of the Society's existence. The opening address on the subject of "Law Studies" was delivered by Mr Wm. Guthrie, advocate, and the closing address on "The Laws of Partnership and Joint Stock Companies," was delivered by Mr F. W. Clarke, advocate, now one of the Sheriff-substitutes of Glasgow. Besides these addresses, which have been selected for the honours of type, the series included a set of lectures on the History and Principles of Conveyancing, by Mr Thomas Thornton; a lecture on "In-

feftment," by Mr J. W. Thomson; and lectures on the Law of Sale by Mr J. D. Grant; on "Judging and Pleading," by Mr Wm. Hay; "The Mercantile Law Amendment Act," by Mr Trayner, advocate; and "Our Law as a system of Equity," by Mr G. H. Thoms, advocate.

The whole series, if we may judge it by the samples here printed, must have been exceedingly interesting and instructive. Mr Guthrie's introductory lecture is an able paper, and, were it published as well as printed, we should heartily recommend a perusal of it to every student of law. The whole field of law literature is rapidly and intelligently surveyed by a writer who has evidently been led himself as a patient and diligent student to work in most corners of it. This species of survey is not new; it has frequently been attempted by old and tried hands; and it is saying much for Mr Guthrie, that for range and clearness of view his paper will bear favourable comparison with any of its class, written on the same scale, that has preceded it. The value of such surveys for students, and even for practitioners, cannot be over-estimated. They are by these enabled to comprehend, or they are reminded, how much must be mastered by them before they can lay claim to the character of learned and philosophic lawyers. It may not be in the power of every practitioner to make good such a claim; but it is possible, and advantageous for him, to understand what it means. In proportion as he comprehends what he ought to be he will tend to become it; while, in the conception of his profession as a *learned* one, he will find sources of support both to his honour as a practitioner and to his personal dignity.

Mr Clark's lecture is a clear outline of the law of Joint-stock Companies—such an outline as could only be given by one fresh from the exposition of the whole of that branch of law in a complete treatise.

We trust that in future years the Society may be able to furnish us with equally valuable specimens of the lectures delivered to its members. The lectures of the last session must have gone far to make up for the want in Dundee of a law-professoriate; and it augurs well for the future of the profession in that place that the organisation to which the series was due, is the result of the spontaneous efforts at self-improvement by the law-clerks of the town.

J. F. M'L.

The Month.

Business of the Court of Session.—By Act of Sederunt, of 11th July, the next winter session of the Court is extended, so that the Inner House commences to sit on November 1st. Thirty causes have been transferred from the roll of the First to that of the Second Division; and various transferences of small numbers of cases have been made during the session from one Lord Ordinary to another. The number of cases set down for trial by jury at the July sittings is unusually small, being only ten in the First and two in the Second Division, and of these a large proportion were settled or delayed before the 20th. The small number of jury trials is probably caused, in some degree, by the introduction of the method of taking proof under the Evidence Act of last year; but it may also be due to the general slackness and want of litigation, of which lawyers are complaining.

The following statistics of the working of the new system of taking proofs since its beginning in November last may be of some interest:—Before Lord Kinloch—14 proofs went on, of which only three lasted more than one day. Before Lord Jerviswoode, twenty-two proofs have been taken, of which one lasted three days, and six lasted two days each. Before Lord Ormidale, ten proofs have been taken, of which one lasted three days, and three two days. Before Lord Barcaple, thirteen proofs were taken, of which only one lasted two days. Lord Barcaple has fixed several proofs to be taken after the close of the session, in virtue of the power to do so given by the Act. Before Lord Mure, nine proofs went on, two of which lasted more than a day, and another occupied part of three days. Four of the cases above mentioned were remitted from the Inner House for the purpose of having evidence taken in this way. Proofs under the Conjugal Rights Act, which have not been numerous, are not included in these figures. Notwithstanding the considerable increase of work imposed on the Outer House judges by this system, there are no material arrears in any of their debate rolls, the longest of which could probably be got through in a fortnight. Indeed an observation which we made at the end of the last winter session may be repeated with perfect truth,—if there had been no proofs to be taken in the Outer House, several of the Bars would have been vacant for several weeks past, except during the calling of the motion roll.

The business of the Inner House, on the other hand, is very seriously in arrear. The last Short Roll cause heard by the First Division last week stood thirteenth at the beginning of the session in a roll of sixty-seven causes; while the Second Division has only reached the nineteenth case in a roll which contained in May forty-seven causes. At least forty reclaiming notes have been sent to the Short Rolls of the Inner House during the Summer Session, so that,

judging merely from the number of causes depending, the two divisions are farther in arrear than they were three months ago. At present, therefore, if a record is prepared with ordinary despatch, a litigant may obtain a judgment in the Outer House within a period from the calling of his case in Court, varying from two to four months. But in an ordinary case he must wait probably for a year longer, for a judgment of the Inner House. The ease with which the delays of the Outer House were recently shortened leads us to ask why the Court itself does not apply an effective remedy to this unfortunate state of things. It has power to extend its own sittings, so as to overtake the business of the country; and an opinion is rapidly gaining ground that this power ought to be exercised.

We have often been very much impressed by the fact that so many hours in the course of the session are spent in the discussion of matters of form, such as granting diligences for recovery of documents, hearing motions for postponement of trial, adjusting issues when no important point of law is concerned, &c., matters which might quite well be left to the determination of a single judge "at chambers," and which are in fact left very much to the head of the Court, the "puisne judges" sitting silent, reading the papers in the causes set down for hearing, correcting the MS. judgments which they are about to read, &c. Surely this might be managed better?

Business Hours in Edinburgh.—The Solicitors before the Supreme Courts have had a meeting to consider a petition by the law clerks of Edinburgh for an abridgment of office hours during the present vacation, and have unanimously resolved to recommend that offices should close at five p.m. during vacation. But the Society, with that public spirit for which it is distinguished, took up a subject of still more general importance to the profession, viz., the hours of attendance at the Register House; and it came to a resolution to communicate with the Society of Writers to the Signet as to making a joint representation with regard to the non-attendance of the Clerks of Court between two and half-past three p.m. during session, as required by A. of S. 7th July 1858. We hope that this movement may lead to a reform, which would be greatly for the convenience of agents and counsel, and we think also for the advantage of litigants. The main reason for keeping offices open in the evening during session is that the Register House closes at half-past three (or, as now appears, at the illegal hour of two p.m.), and is again open for two hours in the evening. If the Register House were open till five o'clock, and closed for the day at that hour, practitioners would not be compelled to detain their clerks in the evening during any period of the year, except for special reasons, and the result would be that counsel would always be instructed before six o'clock, instead of, as often happens, at nine or ten,—very much to their own comfort, and with the greatest advantage to their clients. It is difficult to see why a change so desirable for all concerned should not be at once effected.

The Circuits.—In an article on the conduct of Criminal Cases at Circuit in our number for Nov. 1864, we wrote "that any plan having for its aim a compulsory and equal distribution of circuit practice among those junior members of the Bar who choose to undertake it, would meet with the general approval of the Faculty, and would receive the cordial sanction of the Justiciary Judges." We are glad to learn that a plan for effecting this desirable end, somewhat similar to that suggested by a correspondent in Feb. 1865, has been spontaneously adopted by the gentlemen of the junior bar attending Glasgow Circuit, and is likely, with the cordial concurrence of the agents for the poor for that circuit, to be successfully carried out. Nine out of every ten criminal cases tried at circuit are "poor" cases, and it has been a great grievance to the majority of juniors, travelling circuit at their own charges simply for the sake of getting experience in the conduct of cases in Court, that nearly all these cases are absorbed by men who have approached the agents for the poor, before the opening of the circuit, with unbecoming personal or written solicitation. It was a source of constant complaint that out of perhaps twenty counsel three or four monopolized the forty or fifty "poor" cases at Glasgow, while the others had nothing to do but look on at the performances of their more forward or more fortunate comrades. The Glasgow Circuit Bar has now united to put the matter on a better footing. It was agreed at a meeting held at the Spring Circuit that a list of the "poor" cases at each circuit shall be sent to the senior member of the Bar (the Dean of the Circuit) or to another chosen for the purpose, who shall assign them in rotation to the advocates who mean to attend, and who shall be willing to undertake them. Probably it will be found in practice that this distribution cannot be satisfactorily made until immediately before the circuit opens, and it may be found that it will operate injuriously and unfairly to prisoners in a few more serious and difficult cases. But some provision will no doubt be made for such exceptions. The new system will certainly contribute to the good feeling and to the general welfare of the junior bar. We believe that it is only an old rule restored after being long in abeyance.

We hope that the gentlemen who have had the courage to initiate this reform will go a little further in the path of improvement. Having learned to unite for a very small personal object, we trust that they will co-operate in pressing forward some of the many infinitely more important reforms required in our circuit system. For instance, criminal cases at circuit are very often most carelessly got up by the agents, and are therefore worked with corresponding want of spirit by counsel. A good hint was lately given by Lord Cowan at Dundee in such a case of neglect. The prisoner's counsel made a rhetorical point of the fact that the indictment had been put into his hands only when the trial was about to begin, and that he was unaided by an agent and entirely unprovided with information. The judge, however, in his charge, told the jury that the prisoner's

counsel had no reason to complain, because if he had really considered that the panel's interests were jeopardised by the "poor's" agent's neglect, he should have moved at first for a postponement of the trial. *Verb. sap.*

Again, the circuit bar would well employ its superfluous energy if it were to insist upon the adoption of the rule which exists in England—that the prisoner shall be entitled, on payment of a very small charge, to a copy of the precognitions for the prosecution.

But no improvement of much value is likely to be effected in this department of the administration of the law until the Circuit Court is held for the despatch of civil business as well as criminal. We cannot now discuss fully this important subject, but we recommend it to the earnest consideration of the gentlemen whose efforts at improvement suggested these paragraphs, and still more to that of country agents and litigants. Is there any reason why in Scotland all investigations into facts should not, as in England, take place on circuit, near the locality of the dispute, near the residences of the parties and the witnesses, and generally of the agents who have the real conduct of the case? Why, except for the comfort of Edinburgh lawyers, should not most jury trials and proofs be set down for trial on circuit? Even Edinburgh lawyers will, ere long, we believe, find it prudent, if not necessary, for their own sakes, to suggest or at least submit to a change of this kind. If we had a really earnest law reformer in Scotland, this change, with several others intimately connected with it, would have been effected some years ago. The Dean of Faculty has of late seemed reluctant to bring forward measures of reform which parliament was too languid to carry through, or which the obstructives, who are always powerful in questions of administrative reform, were sure to defeat. We hope that in a reformed parliament, and with the weighty assistance of Mr Young, the Dean will again become the leader and the hope of Scottish law reformers.

Salaries of Sheriff-substitutes.—A deputation from the Sheriff-substitutes of Scotland, introduced and supported by a number of members of Parliament, has had an interview with the Home Secretary, to urge upon the Government the necessity of providing a more suitable remuneration for the office. We have reason to believe that the reception of the deputation was satisfactory, and that the authorities at the Home Office are now convinced that as a body the Sheriff-substitutes are not remunerated as the duties and social position of resident county judges require. We hope, therefore, that a revision of the scale of salaries will soon take place.

Mr Charles Scott on Law Reforms.—The high position which Mr Scott's talent and energy have secured for him at the bar entitle him to speak with authority on questions affecting the improvement of our system of jurisprudence and its administration. His recent ad-

dress to the working classes in Queen Street Hall* on the important question, What should the working man do with his vote? exhibits him, however, in a character in which he was previously little or not at all known to his professional brethren, and one in which, in ordinary circumstances, we should not be called upon in these pages to criticise his utterances. We have nothing to do with Mr Scott as a democratic Tory, answering the question we have quoted, with charming frankness, "Why, of course, give it to the Conservatives." But it happens singularly enough that in Mr Scott's lecture, like a fly in amber, we find imbedded one or two passages of infinitely greater value than the rest, passages which deserve attention as well for their own suggestiveness as for the respect justly due to Mr Scott when he speaks of subjects connected with his profession.

He insists on the value of the ancient and now rather unpopular institution of jury trial, and hopes for its re-invigoration by the infusion of working men into juries. Perhaps they would do no harm there, possibly they would do the work required of jurymen with as much intelligence and fairness as the middle classes, whom Mr Scott accuses of unfaithfulness to their trust "in regard to this most ancient and conservative mode of trial." Observe that in this lecture conservative = excellent, otherwise we should have difficulty in discovering the meaning of the word in this connection. Anxious, however, to remove any objection to the extension or revival of jury trial lurking in the minds of his disciples, Mr Scott hastens to assure them.

"Of course, a workman, called to the jury, must receive an equivalent for the wages lost to him by the performance of this great public duty; but in every other respect, the whole official costs attending a jury trial should be swept away, and with the whole householders of the country on the jury roll, an ample number of jurymen could be had without oppressing any individual whatsoever."

There is no reason why a juryman should not receive some compensation for his loss of time in performing a public duty, although hitherto this duty has to some extent stood on the same footing as witness-bearing, a duty which every man owes to his fellow-citizens, and out of which he may not make profit because he may to-morrow be himself a litigant and may call upon his neighbours to do the same office for him. But we can hardly imagine that Mr Scott, by this sentence, means to suggest that jurymen should be fully paid or overpaid, while counsel, agents, judges, and clerks, should do their work gratuitously. Perhaps, if he had not been speaking as a conservative orator to working men, he would have made his meaning clearer; for there is at the Scotch bar no greater master of the pellucid style than Mr Scott. We think, however, that one of the remedies to be applied to the "broken down" system of jury trial in England is to be found in the direction which he has indicated.

The evil which has most profoundly impressed Mr Scott in the course of his experience of criminal courts, and that upon which he

* "What should the Working Man do with his Vote?" Edinburgh: Henry Robinson.

insists most strongly in addressing the legislatures of the future, he ascribes to the malign influence of "the dominant middle class."

"If some hardened ruffian has committed crime after crime, and has heaped conviction upon conviction, he thereby qualifies himself for the care of those cultivated judges, who form the High Court of Justiciary, and becomes entitled to gratuitous counsel, and to the protection of a jury of his countrymen. But if some little boy or girl, who scarcely knows what crime is, has incurred suspicion, and is for the first time charged with some disgraceful deed, what is the unhappy lot of the poor youthful victims? They are dragged before some petty court, often on the instant, and without advice or defence, and after a hurried proceeding, which is called a trial, are marked for ever with that brand of shame, which can never be effaced during the remainder of their lives. Many a workman's boy, many a workman's girl, who has never put forth its hand to steal, doubtless walks trembling from the bar, a convicted thief, and after a polluting immurement within a prison, comes forth into the world, the boy to become a plunderer of society, the girl to walk the streets a prostitute, daily and nightly, like the Nemesis of old, avenging upon Society the wrong which Society has committed.

"No one can tell the extent to which such iniquities exist, for care has been taken to invent a system by which all trace is destroyed of their perpetration. The victim can be seized at once, and immediately placed without warning in the dock; no defender is provided for him; no intimation is given to him, trembling and confused as he must necessarily be, that he may demand a short delay. This does not constitute oppression in the eye of the law, although more atrocious oppression it is impossible to conceive. No record of the evidence is permitted to be kept, although the pen of a short-hand writer could preserve every word without delaying the proceedings of the Court for an instant. The facts linger only in the memories of the police, and nothing remains of the abomination, except the formal sentence and a ruined life."

Mr Scott expends a good deal of eloquence upon "the sham and mockery of an appeal" which now exists, and tells very well and (as appears from the parentheses of "profound sensation," &c., with which the pamphlet is copiously sprinkled) with great effect, the history of a terrible case of oppression which occurred in his own experience. It is too pathetic for our pages. The passage which follows contains much truth, although we must object to its unnecessary heat and its tone of demos-worship.

"Why is it that these poor children,—why is it that humble individuals, accused of crime, are sacrificed with such ruthless and indecent haste? Why is it that they are branded with disgrace in such hurried form, and yet with such irretrievable result? Is it because Her Gracious Majesty so wishes? or that the Peers of the realm so desire? or that educated men approve of such proceedings? or that the People demand it? By no means. It is simply that the police may get quickly through their business, and the functionaries of the Local Courts perform their duties comfortably, without their digestion being disturbed, or their sleep broken, by appeals to the high officials of justice. You have all heard of a bureaucracy—one of the worst forms of oppression to which a people can be subjected—and I have no doubt you have supposed it was confined to such benighted countries as Austria or Russia. But here is a bureaucracy rampant at our own doors, swarming forth and besetting the members of the Legislature, whenever an attempt is made to introduce the light into their dark places. It is scandalous that those officials, who are but servants of the public, and paid from the funds of the nation to protect the lieges, should erect themselves into a hostile interest for the oppression of the public. It is impossible that the workmen of this country can tolerate such a system. It is upon them and their children that the heavy hand of this iniquity falls. I have seen, in my brief experience, stalwart and respectable apprentices, law-abiding young men, with hands hardened and faces bronzed with honest toil, dragged under the Master and Servant Act, from their beds, before daylight, and before the day was half done, condemned without redress to unnatural idleness, or to barren labour, within the degrading walls of a prison. The crowning iniquity of this bureaucratic tyranny,

its most recent product, is what is called, and may well be called, the Summary Procedure Act, which positively denies all redress for every defect, whether in substance or in form, and which immediately on its introduction was applied to rivet and to strengthen the already rigorous fetters of the Master and Servant Act. The Supreme Court, to its credit be it said, has shown no favour to this atrocious specimen of class legislation, and special honour is due to the scholarly and accomplished Judge who now presides in that learned College. I cannot enter further into detail; but such a system cannot remain unaltered. The same care must be bestowed upon the unconvicted child or respectable workmen, as upon the seven-times convicted felon. It is absolutely monstrous to allow a petty court to destroy for ever characters which have previously been unblemished and possibly uncorrupted. Surely, gentlemen, it is reasonable to take as much trouble with such a matter, as with a mere question of some insignificant debt, which can demand the successive care of three or four separate tribunals. Let the Police Courts deal without review with such minor and befitting matters as chimneys on fire, throwing out of ashes, or beating of carpets, or even with assaults and breaches of the peace, which do not bring with them a permanent disgrace. But wherever there is an accusation for the first time of infamous or disgraceful crimes, such as theft, reset, or offences against decency, which are kept up against a man for ever,—as well as in all cases which involve the disputes of master with servant, or of one class with another,—there should be an undoubted right of appeal to the highest tribunal, as well upon the facts as upon the law."

Mr Scott stands high in the counsels of his party, he is a "coming man," and we therefore rejoice in his indignant denunciation of the Summary Procedure Act. For is not the iniquity of that measure entirely due to the Duke of Buccleuch, the recognised chief in Scotland of the Tory party, acting in concert with, or prompted by, the clerks of the peace throughout Scotland, and the secretaries of certain Maine-Law and Teetotal Societies? And was not the attempt in 1866 to cure the evil by restoring the ten lost sections frustrated by the same unholy alliance?

The Attorney's Certificate Duty.—Mr Denman's bill for abolishing this impost has unfortunately been rejected by a majority of 21 in a house of 153 members. This result, which can, we believe, only temporarily delay the repeal of the duty, was chiefly due to the strenuous opposition of the Government. Some members, and notably Mr Fawcett, for want of better reasons, attributed their opposition to the bill to the fact that some attorneys among their constituents had requested them to support it; but it cannot be imagined that more than one or two could be influenced by so whimsical a reason.

Combination Laws—Intimidation.—The other day a trial took place at Hamilton, before Sheriff Veitch, for contravention of the Act 6, Geo. IV., c. 129. The panels were the Secretary and the President of the Hamilton Amalgamated Shoemakers' Society, and the offence charged was using threats or intimidation "towards Michael Keenan while employed at his trade of a shoemaker, for the purpose of forcing him to contribute to the common fund of the club or association of which they were members, by threatening him that unless he paid the sum of 5s. 8d. to this fund, they would cause him to be dismissed from the shop where he obtained his work, and to lose his employment; and the said Michael Keenan having declined

to comply with the demand, the accused, on 11th June, did further molest and obstruct Keenan by intimating to his employers that unless he contributed to the fund he must be dismissed, otherwise the rest of the workmen, members of the association, would leave their employment." Objections stated to the relevancy of the complaint were repelled, and after evidence had been led, the prisoners were convicted and sentenced to seven days' imprisonment. This judgment is borne out by the recent decision of the Court of Q. B. in England upon a case stated by the Justices of Somersetshire, who had sentenced a man to a month's imprisonment for a precisely similar threat. *Skinner* v. *Kitch*, 16 L. T. N. S. 413. Both cases are instances of a mere use of undue influence being held a threat within the Act. Upon the English decision the *Law Times* (May 18) pertinently remarked:—

"This law applies equally to masters and men. Undue influences used by the masters to induce other masters to act with them may be punished in like manner. But still more important is another question that seems to be raised by this view of the statute. Is a *lock-out* legal? Have the masters a right to agree together to close their doors against all workmen for the purpose of compelling other workmen, by the pressure thus put upon them, to accept the terms offered by the masters? Perhaps the point may be worth consideration by both parties, and suggest the propriety of a compromise."

Obituary—Sheriff Trotter.—We have to record the death of John Pitcairn Trotter, Esq., Advocate (1826), Sheriff-Substitute of Dumfries-shire, at Oakfield, near Dumfries, on 5th July. Mr Trotter was a native of Berwickshire. After acting for a short time as Sheriff-Substitute at Dunblane, he was transferred to Dumfries in 1837, and he has since discharged the duties of his office with great fidelity and satisfaction to the profession and the public. During his long residence in the county he formed a large circle of friends, and his hospitable home was freely open to every tourist and literary stranger who made his acquaintance while visiting Nithsdale. On the judicial bench, in criminal cases, he was stern and somewhat severe. To the conduct of civil business, he brought an extensive and accurate knowledge of law, a ready memory, and strong common sense. He was well read in general literature, much of his leisure being spent in reading and translating from the German. He delighted to hold friendly and brotherly intercourse with such men as Thomas Aird, Sheriff Glassford Bell, Professor Blackie, Robert Chambers, and the late Mr Macdonald of Rammerscales. In private life he was amiable, but somewhat eccentric and changeable in his humours; he had strong likings and dislikings, but withal his heart was manly, and generous, and full of love and sympathy for human suffering and wrong. He had a great fund of anecdote, and few who have heard him will forget the amusing and graphic way in which he told a story or repeated some old border ballad. Occasionally, like Oliver Goldsmith, for the amusement of children, he became the lord of misrule for a night, and gave way to all sorts of drollery and bur-

lesque. But his mirth and gaiety were always innocent, and a sort of recreation and unbending of the faculties after the sterner daily duties of his profession had been duly and conscientiously performed.

Appointments.—By an oversight we omitted to notice last month the appointment of Mr WILLIAM WALKER JOHNSTON to be a Depute-Clerk of Session, in room of Mr Thomas Potts, deceased.

MR DAVID BOYLE HOPE, Advocate, (1859), has been appointed Sheriff-Substitute of Dumfries-shire, in room of Mr Trotter, advocate, deceased. Mr Hope leaves the Parliament House with the good wishes and esteem of all his brethren. His departure leaves the Supreme Courts, we believe, for the first time almost for two centuries, without a single representative on the bench or at the bar of the eminent name and family to which he belongs.

John H. A. MACDONALD, Esq., Advocate (1859), has been appointed Counsel for the Admiralty, in the room of Mr W. E. Gloag, recently appointed Advocate-Depute in the Sheriff Courts.

Appointments—England.—Sir John Rolt succeeds the late Sir G. Turner as Lord Justice of Appeal. Sir J. B. Karslake becomes Attorney-General, and is succeeded as Solicitor-General by Mr Selwyn Q.C.

PRECEDENCE AT THE BAR—PROPOSED APPOINTMENT OF QUEEN'S COUNSEL.—A meeting of the Faculty of Advocates was held on Friday, June 28, in the corridor of the Advocates' Library, for the purpose of considering a resolution proposed by the Dean, and in his absence supported by the Vice-Dean, that, in the opinion of the Faculty, it is expedient that its members should be placed on the same footing in regard to the appointment of Queen's Counsel as the bars of England and of Ireland; and that the Dean and his Council be directed to communicate this resolution to her Majesty's Government. It was moved by Mr Watson, as an amendment, that the Government should be requested to confer patents of precedence on the Lord-Advocate, Dean of Faculty, Solicitor-General, ex-Lord Advocate, and ex-Solicitor-General for the time being, entitling them to precedence in all courts in England in which they have right to appear as members of Faculty, *i.e.* in the House of Lords, judicial committees of the Privy Council, and before committees of Parliament. The amendment being put as against the original resolution, was lost by a majority of twelve. Afterwards the resolution was put and carried by a considerable majority. About seventy members attended the meeting. A protest has been signed and lodged by thirty-two dissentients, including many who were not at the meeting, on the ground that it is *ultra vires* of the Faculty by a mere majority to make a fundamental change on the conditions agreed to by each advocate at his admission to the Faculty, and on various other grounds. Notice was also given of a motion for next meeting of Faculty, that, in respect of the small majority by which the resolution was carried, the Faculty is of opinion that it should not be acted upon. It was stated at the meeting, by one of the most important supporters of the proposed change, that they would not wish to carry out the wider resolution unless there was substantial unanimity in the Faculty; and it is generally supposed that, in consideration of the small attendance at the meeting, the importance of the subject, and the large minority voting against it, no action will at present be taken on the resolution.—*Scotsman.*

LINCOLN'S INN.—At an adjourned council of the benchers, 10th July 1867, Sir W. P. Wood, V.C., in the chair, it was ordered, on the motion of Mr J. F. Macqueen, Q.C., that with reference to the exemption of students from making a deposit of L.100, and the return of such deposit when made, a certificate produced by a student from the Universities of St Andrews, Aberdeen, Glasgow, or Edinburgh respectively, shall have the same effect as a similar certificate from any of the Universities in England or Ireland." Lincoln's Inn, it may be added, was for upwards of a century the chief resort of Scotchmen going to the English bar—indeed, its greatest names are Scotch, as Lord Mansfield, Lord Loughborough, Lord Erskine, Sir William Grant, Lord Campbell, and Lord Brougham.—*Scotsman.*

CALLS TO THE BAR.—Mr James Henry Gibson-Craig, B.A., Cantab.; Mr Arthur Makgill, B.A., Oxon; Mr James Patrick Bannerman Robertson, M.A.; Mr John M'Kie Lees, M.A., and Mr Moir Reid Stormonth Darling, M.A., have been admitted as members of the Faculty of Advocates.

SOLICITORS IN THE SUPREME COURTS.—Mr William G. Roy, formerly of Dundee, Mr James Campbell Irons, and Mr George Andrew, have been admitted Solicitors before the Supreme Courts.

VACATION ARRANGEMENTS.

BOX-DAYS.—Thursday, 29th August, and Thursday, 10th October.

BILL CHAMBER ROTATION OF JUDGES.

Monday, 22d July, to Saturday, 3d August,.....Lord Curriehill.
Monday, 5th August, to Saturday, 17th August,...Lord Benholme.
Monday, 19th August, to Saturday, 31st August,...Lord Kinloch.
Monday, 2d Sept., to Saturday, 14th Sept.....Lord Ormidale.
Monday, 16th Sept., to Saturday, 28th Sept., ...Lord Barcaple.
Monday, 30th Sept., to Saturday, 12th Oct.,.....Lord Mure.
Monday, 14th Oct., to Saturday, 26th Oct.,.....Lord Curriehill.
Monday, 28th Oct., to Meeting of Court,.....Lord Benholme.

AUTUMN CIRCUIT, 1867.

WEST.—Lords Justice-Clerk and Cowan—Stirling—Monday, 23d Sept., at twelve o'clock noon; Inverary—Thursday, 26th Sept.; Glasgow—Tuesday, 1st Oct., at 12 o'clock noon. Roger Montgomerie, Esq., *Advocate-Depute;* W. Hamilton Bell, *Clerk.*

NORTH.—Lords Deas and Neaves—Dundee—Thursday, 12th Sept.; Perth—Monday, 16th Sept.; Aberdeen—Wednesday, 18th Sept.; Inverness, Tuesday, 24th Sept. Robert Lee, Esq., *Advocate-Depute;* Æneas Macbean, *Clerk.*

SOUTH.—Lords Ardmillan and Jerviswoode—Jedburgh, Tuesday, 10th Sept.; Dumfries—Friday, 13th Sept.; Ayr—Tuesday, 17th Sept. James Adam, Esq., *Advocate-Depute;* Robert L. Stuart, *Clerk.*

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

MORRISON & MILNE *v.* BARTOLOMEO & MASSA.—*June* 8.

Insurance—Collision—Reparation—Verdict.

Motion to apply verdict in counter actions between owners of the Ghilino and the Scotia, for damages by collision. Verdict for Scotia, damages £566. The jury also found, by direction of the Court, that the owners of the Scotia had recovered from underwriters £350. The owners of the Scotia moved to apply the verdict, and produced at the bar an assignation by the underwriters of all right they might have to damages or otherwise against the Ghilino. Defrs. maintained that Morrison & Milne, having recovered

the sum in the policy before bringing their action, were entitled to recover the sum in the verdict only under deduction of the insurance recovered. The underwriters had become vested with a right of action against the Ghilino, and if they waived their right to insist in such action, their right accrued to the wrongdoer and not to the party insured. The insured was not entitled to recover reparation of his loss twice. [Stewart *v.* Greenock Marine Insurance Co., 13th Jan. 1846, 8 D. 326; Addison on Contr. 845.] The Court, without calling on counsel for pursuers, applied the verdict and decerned for £566, and expenses. It was not necessary to inquire what opinion they would have formed if the assignation had not been produced. The damages caused by the Ghilino had been assessed by the jury, and its owners had no longer any interest except to see that the party who got the sum awarded against them represented every claim competent against them in consequence of the damage done.

Act.—Young, John M'Laren. Agents—Henry & Shiress, S.S.C.—— *Alt.—Gifford, Asher. Agents—Murdoch, Boyd, & Co., W.S.*

PETN.—DONALD CAMPBELL.—*June* 11.

Proof—22 Vict. c. 20—Production of Documents.

The particulars of this application by Lieut. Donald Campbell, a claimant of the Breadalbane peerage, appear from the opinion of

The L. PRESIDENT, who said that the petn. was presented under 22 Vict. c. 20, a very beneficial statute, intended to facilitate the obtaining of evidence in suits carried on in one part of the kingdom when the witnesses reside in a different part of it. His Lordship stated what machinery the Act provided for this purpose. Now it was stated that the petr. had instituted a suit in Chancery for perpetuating testimony, in which he obtained an order appointing an examiner to take evidence in Scotland. It was certainly competent for petr. to ask this Court to appoint that any witnesses in Scotland should attend before this examiner. But there was introduced into the petition a *subpœna duces tecum*, a writ with which we had nothing to do in Scotland. His Lordship narrated proceedings in Chancery for setting aside this *subpœna*, which resulted in a judgment of the Lords Justices refusing to set it aside, and finding that the application of it was entirely a matter for the discretion of the Court of Session. The parties came back, and both seemed satisfied that this *subpœna* should never have appeared in the petition at all. He read the petition, therefore, as if the *subpœna* had never been in it. It could have effect only within the jurisdiction of the Court of Chancery, and could have no effect at all *extra territorium*. The question then was, What order should now be pronounced? The Court was asked to order the examination of Lord Dalhousie and four others, and, further, as to the trustees of the late Marquis, that they do "produce and exhibit the writings, documents, &c., above mentioned." These writings are contained only in the *subpœna*. What might be the right of petr. to these it was not for the Court now to determine. It was out of the question to order the parties to produce them now *per aversionem*. The parties should be ordered to appear, and if in the course of examination production of these documents should appear necessary, and if petr. should be found to have interest, the question discussed would then be properly raised before the examiner. Whether he had any power to determine it at all, his Lordship did not now say. But the ultimate determina-

tion of the question was for this Court. His Lordship had no doubt as to the construction of the statute. "It shall be lawful for such Judges to command the attendance of any person to be named in such order for the purpose of being examined, or the production of any writings or other documents to be mentioned in such order, and to give all such directions as to the time, place, and manner of such examination, and all other matters connected therewith, as may appear reasonable and just," &c. It may be this Court would have a very delicate duty to perform. His Lordship did not anticipate his opinion as to the question if properly raised; but the Act gave the determination of it to this Court, and he gave that opinion now for the guidance of parties.

The other judges concurred, and the Court ordered the attendance of the witnesses, and *quoad ultra* superseded consideration of the petition, refusing to make any order as to expenses.

Act.—Advocatus, Sol.-Gen., Pattison, Mair. Agents.—J. & W. C. Murray, W.S.——Alt.—Young, Clark, Adam, Watson. Agents—Adam and Kirk, W.S., and Davidson and Syme, W.S.

FRASER *v.* YOUNGER & SONS.—*June* 13.

Reparation—Fault—Bill of Exceptions.

Action of damages for the death of pursuer's daughter from injuries sustained by an unfenced shaft in the mash-house of defr's brewery. The action was tried on April 1, before L. Kinloch and a jury. The decd., who was 34 yrs. old, had gone into the brewery to get draff, was there caught by a shaft and killed. Verdict for defrs. The Court refused a rule for a new trial, and pursuers were heard on a bill of exceptions. The exceptions argued, were 2. To a direction that "if they, the jury, were satisfied on the evidence that Ann Fraser ought not to have been in the mash-house of defrs. on the occasion in question, defrs. were entitled to a verdict;" and, 3. "That the act of the servants of defrs. in allowing decd. to come within the mash-house would not affect defrs., if the jury were satisfied on the evidence that their doing so was in contravention of a direct order of defrs."

L. PRESIDENT—In dealing with a bill of exceptions, it is necessary to look first to the issue; but, in the second place, and especially in considering exceptions to directions given after all the evidence has been led, it is necessary to look to the case made on the evidence by parties. The Court is not entitled to look to evidence so as to form for itself conclusions of fact; but it was with reference to the contentions of parties that the Judge gave the direction, and it must be interpreted with reference to these contentions. The pursuer's case was that decd. received the injuries from the machinery of defrs., which should have been fenced, and the question arose, upon the words, "through the fault of the defrs." Pursuer contended that the fault was entirely on the part of defrs. or their servants, and that the mash-house was the proper place for the purchase of draff. Defrs. maintained that there was a rule that no one should come into the mash-house for that purpose. that decd. was aware of this rule, and had repeatedly been forbidden to enter the mash-house. That is the case on the one side and the other. What, then, is the direction in the circumstances? [Reads.] The only serious objection to this direction is, that it was equivocal and calculated to mislead, or, more accurately, calculated to lead different jurymen in different directions. The words "ought not to have been in the mash-house" imply

the existence of fault somewhere—but that might have been in pursuer, or in defrs. or their workmen, or partly in pursuer and partly in defrs. According to the result on the evidence, there was a different result in the law. But the jury was left to digest the evidence with this most ambiguous and most misleading direction; and the difficulty is aggravated when you consider that one part of the jury may have thought the pursuer in fault, and another part that defrs. were in fault, and a third that both were wrong, and yet that they might upon this direction have all arrived at the same result, which they certainly ought not to have done, if they entertained these different views of the evidence. As to the third exception, it does not matter in what connection with the evidence it is looked at. It is unsound in law, because the question whether the acts were done in contravention of the order of defrs. or not, has nothing to do with their liability. I see no other course, therefore, but to allow the second and third exceptions; and I am sorry to be driven to this conclusion, because, upon the motion for a rule, we saw the evidence, and were satisfied that the case was not sufficient to fix liability on defrs. because the evidence disclosed fault of decd. herself. We have no alternative; for in considering the exceptions, we are tied down to the record of the bill of exceptions.

The other Judges concurred. Second and third exceptions allowed.

Act.—Fraser, M'Lennan, Campbell Smith. Agent.—W. R. Skinner, S.S.C.——Alt.—Gifford, John Hunter. Agents.—Morton, Whitehead, and Greig, W.S.

Susp.—MACALLISTER *v.* DUTHIE.—*June* 15.

Interim Decree—Retention.

Duthie sued Macallister for £96 as the balance upon an account. Macallister admitted £52, for which the L. O. (Mure) pronounced *interim* decree. This decree was extracted. Upon a proof, the L. O. found Duthie entitled to £12 more, but liable in modified expenses. Duthie reclaimed, and meanwhile charged on the *interim* decree. Macallister suspended on the ground that he was entitled to retain for expenses. Susp. refused, the Court holding that suspr. had no right of retention when *interim* decree was pronounced. If he had, he might have pleaded it, and prevented decree going out then, and he had acquired no such right since.

Act.—Scott. Agent—W. Officer, S.S.C.——Alt.—Fraser, Skelton. Agent—Lockhart Thomson, S.S.C.

DOW *v.* JAMIESON.—*June* 18.

Advocation—Reporting to Inner House.

In this adv. the L. O. (Barcaple) pronounced the usual interlocutor under 13 & 14 Vict. c. 36, reporting to the First Division, and appointing the record, with notes of additional pleas in law, productions, &c., to be printed and boxed, and granting warrant for enrolling in the Inner House rolls. The advocator had failed to do so, and the L. O. of new pronounced an interlocutor appointing him to print and box the record, &c., within eight days. He still failed to do so, and respt. moved to refuse the advocation, with expenses. The L. O. having doubt whether the cause was still depending before him, reported, referring to Miller *v.* Logan, February 9, 1858, 20 D. 522, in which, after a similar order, the respt. became bank-

rupt, and the Court held that an order for intimation to the trustee should be moved for before the Lord Ordinary.

Lord President—The principle of the case of Miller seems to be, that the L. O.'s reporting of the case is not complete by the mere pronouncing of the interlocutor in the usual form. Without going into the niceties of that case, but following the principle, it seems to follow that, till one party brings the case here by moving it in the Single Bills, the transference from the Outer to the Inner House is not complete. The solution of the difficulty seems to be that, if the respondent will print and box the interlocutor of the L. O., with the note of advocation, it will appear in due course in the Single Bills, when he can make his motion, and the Court may also consider what penalty should be inflicted on the advocator.

Counsel for the Respondent—M'Kie. Agents—Paterson & Romanes, W.S.

Hally *v.* Lang.—*June* 27.

Landlord and Tenant—Ejection—Removing—Vicious and Precarious Possession.

Advocation of a summary petn. for ejection and removal presented by Hally as trustee on the sequestrated estate of Lang. The petitioner set forth that he was heritable proprietor of the lands of Blackmailling; that the respts., said G. Lang and Robert his son, occupied the whole lands of Blackmailling, except a dwelling-house and pertinents jointly occupied by the other respts., Mrs Eliz. Lang, mother of the bankrupt, and his sisters; and that petr. was about to sell the whole subjects. Mrs Lang and daughters defended. After proof, both Sheriffs (of Dumbarton) dismissed the petn. The nature of the question appears from the judgment of

The Lord President—Robert Lang died 8th Jan. 1858, leaving a trust-disposition and settlement, conveying his lands to trustees, and directing them to give or see secured to his widow and daughters a liferent of the house and garden, &c., and appointing the lands, on the extinction of the liferents, to be conveyed to the bankrupt, who was to have right to the unliferented part of the lands on payment or fulfilment of certain provisions. There can be no doubt that, by virtue of this deed, if it is to receive effect, the eldest son is to succeed to the estate subject to the liferent. It is now conceded that the truster possessed on apparency only; but George, having made up a title by writ of *clare constat*, recognising him as heir of his grandfather, and passing over his father, the consequence is that, if Lang had been solvent, he would have been liable to fulfil the provision to the mother and sisters. George was sequestrated four years before his father's death, but the trustee, so far from interfering with the provisions of Robert's deed, allowed the possession of the widow to be undisturbed for more than seven years. Whether it was for seven years or more, however, is of little importance. In 1865, Hally got bankrupt to make up his own title, and executed a disposition in his favour, which was completed by registration two days before the petition was presented. Till then the trustee never thought of disturbing the possession of the widow. In these circumstances one would be inclined to demand a particularly distinct and explicit statement of the grounds of ejection; yet in this petition there is no allegation of any such ground whatever. It is not said respts. possess without title, or by a vicious or precarious possession; but only that the title is in petr., and

respts. are in possession, and should be ejected. Now, this was utterly incompetent under any circumstances; and, if possible, still more incompetent in this state of the facts. Mr Hunter (L. and T. ii. 77) properly observes that there is much confusion of language about summary removings and summary ejections, two things which are so much mixed up that it is difficult to treat them separately. Summary ejection is a remedy which can only be taken in certain well-defined circumstances. It would be rash to enumerate all the cases in which it may be used, because in some peculiar cases its competency depends on circumstances which require to be set forth very specifically. But it may be said generally that the proper grounds for summary ejection are that the possession is vicious or precarious. Here there is no allegation of either the one or the other; and when the pursuer is offered an opportunity of amending his statements by a condescendence—which was a great and, I think, an undue indulgence in a petition plainly incompetent—still he is as far as ever from stating any competent grounds. Anything more loose and more absurd could not be conceived. I think the plain and simple ground of judgment is that the petition is on the face of it incompetent, as not stating that the possession is either vicious or precarious.

Lord Curriehill concurred.

Lord Deas—There were three grounds sufficient to justify the petition being dismissed. (1.) That there was not set forth in the petition, or even in the condescendence, any such relevant ground of action as, according to the forms of proceeding in the Sheriff Courts, would warrant ejection. (2.) That on the face of it this was not a case within the Act of Sederunt, according to which summary ejection was only competent in cases requiring extraordinary despatch. (3.) Even if an action of removing had been brought, his Lordship was inclined to think respts. entitled to a possessory judgment as having possessed on an *ex facie* good title.

Petition dismissed.

Act.—Mackenzie, Thoms. Agents—Lindsay & Paterson, W.S.——Alt.—Sol.-Gen., A. Moncrieff. Agents—M'Ewan & Carment, W.S.

Dickson *v.* Matthew, *June* 28.

Bankruptcy—Preference—Bond—Acknowledgment of Debt—1696 *c.* 5, *Husband and Wife.*

Appeal from decision of S. S. of Dundee, in the seqn. of Matthew. The seqn. was of date 3d July 1866. The bankrupt's wife claimed for a debt of £652, and interest due to her by the bankrupt, exclusive of his *jus mariti* and right of administration; voucher produced was a bond, dated 28 June 1866, granted to her by the bankrupt, on the narrative that he had, at specified dates, borrowed from her sums of money part of her separate estate, and no receipts had been granted by him. The trustee rejected the claim, holding that the bond was struck at, both by the Act 1621, c. 18, and the Act 1696, c. 5. The S. S. remitted to the trustee to admit the claim. The trustee appealed. The L. O. on the Bills (Curriehill) adhered, holding that the onerosity of the bond was proved, that the Act 1621 was thus excluded, and that 1696, c. 5, did not apply to a mere acknowledgment of debt used to the effect of making the grantee a common creditor, and not of creating a preference. The trustee reclaimed.

The Lord President.—The question was important, and had never yet

been decided. With regard to the Act 1621, c. 18, he had no difficulty. The evidence established the *bona fides* of the debt. The Act 1696, c. 5, enacted that all voluntary deeds granted within sixty days of bankruptcy in favour of creditors "*either for their satisfaction or further security in preference to other creditors*, should be void. Now if this Act was being construed for the first time, he should have little difficulty in holding that it did not apply to cases like the present. The granting of an acknowledgment of debt was no doubt "*voluntary*," but was not "in satisfaction" of a prior debt. Neither could it be said to be "in further security or in preference to other creditors." No preference was sought to be established here, but only a ranking as an ordinary creditor. If the statute only was to be looked at, there would be little difficulty. But it was said that it had been construed according to the contention of the appt., and, amongst others, that Bell (Com. II. 212, 213) laid it down that even a voucher or acknowledgment of debt granted within the sixty days was struck at. That was not Mr Bell's meaning, or the meaning of the dicta in the cases. The cases referred to by Mr Bell, as well as the more recent case of Wilson *v.* Drummond, 16 D. 275, were all cases of *preferences* direct or indirect, and therefore there was no necessity for assuming the extensive meaning here put upon them by appt.; but if such was the meaning of the authorities, then these authorities were wrong. The reclaiming-note should be refused, with this qualification, that so much of the sum claimed as interest, as applied to the interest accumulated in the bond, should be struck off the claim. So far as the bond accumulated principal and interest, it might be said to create a preference, and therefore he was for disallowing anything that followed from that accumulation.

Lord DEAS dissented, holding that under the Act 1696, c. 5, all deeds were struck at which *might* be used for the purpose of creating a preference; that this deed *might* have been used for that purpose, even if no preference was actually created; but further, that a preference was actually created by giving one creditor rather than another a document liquidating and constituting his debt.

Lord ARDMILLAN and Lord CURRIEHILL concurred with the L. Pres.

Act.—Clark, Mr Watson. Agents—G. & J. Binny, W.S.——Alt.—Monro, Mackintosh. Agents—Hill, Reid, and Drummond, W.S.

HILTON *v.* WALKER.—*July* 2.

Process—Judicial Reference—Expenses.

Hilton sued the Walkers, for some time tenants under him, for damages for miscropping. Parties agreed to a judicial reference to Smith, who awarded L.20 damages, but found the pursuer liable to defr. in L.50 of expenses in respect that the action ought to have been brought in the local Court, and not in the Court of Session. Pursuer objected to this award of expenses, mainly because parties had not been heard as to expenses, and that the expenses actually incurred were less than the sum awarded. The Court remitted to reconsider this part of the award; and after hearing parties, he simply adhered. Pursuer repeated his objections.

LORD CURRIEHILL said the objection was in substance that the referee did not take the assistance of the auditor in ascertaining the expenses to be awarded; and the pursuer moved to remit to the referee to do so now. Was that motion competent? He was of opinion that it was not, on the

ground that, although this was a judical reference, yet in this respect it was the same as if it was an extrajudicial submission. There were some differences between a judicial reference and an extrajudicial submission. In a judicial reference, if there has been any irregularity, it may be rectified at any time before the award is affirmed by this Court; but with that exception, the powers of a judicial referee are as great, and can be as little interfered with, as the powers of a voluntary arbiter; and the referee having now done his duty by hearing parties, the Court cannot review his judgment on the ground that it is erroneous. It may be regretted that the referee did not take the assistance of the auditor, but he was quite entitled to deal with the matter of expenses at his own hand. He had in this matter the same powers as the Court.

Lord Deas concurred.

Lord Ardmillan concurred with difficulty, regretting that the arbiter should have so dealt with the case.

The Lord President concurred with difficulty. Any gross abuse in such a matter could, however, be reached under the head of corruption. That was not alleged here.

No expenses to either party.

Act.—Young, Gifford. Agent—W. Scott Stuart, S.S.C.——Alt.—Pattison, M'Kie. Agent—James Somerville, S.S.C.

Moes, Moliere, & Tromp *v.* Leith and Amsterdam Shipping Company.—*July* 5.

Bill of Lading—Exception of Breakage.

Action by merchants in Amsterdam against the registered owners of the steamship Ivanhoe. Issue, "Whether, on or about 15th Dec. 1865, pursuers shipped at Amsterdam, on board defrs'. s.s. Ivanhoe, a quantity of sugar, in good order and condition, to be conveyed in terms of the bill of lading contained in the schedule annexed thereto? and whether defrs., in breach of the contract between the parties failed to deliver said sugar in like good order and condition at the port of Leith—to the loss," &c? The bill of lading bore that 5453 loaves of refined sugar had been shipped "in good order and condition," and stated that the goods were "to be delivered in the like good order and condition at the port of Glasgow, the responsibility of the ship to terminate at Leith." The owners were not to be liable for all "accidents, loss, and damage whatsoever from other goods, by leakage, contact, or otherwise, from machinery, boilers, and steam, or steam navigation, or from perils of the sea and rivers, or from any act, neglect, or default whatever of the pilot, master, or mariners, in navigating the ship, or from materials or labourers in loading or discharging the goods;" or for any consequences of these causes. After stating that the three bills were signed by the master, &c., this clause followed—"Weights, contents, measure, quantity, and value unknown, and not answerable for damage, leakage, lighterage, breakage, corruption, rust, torn wrappers, decay, or mortality, and the wrong delivery of goods caused by error, or by insufficiency in marks or numbers." The jury returned a special verdict, finding "that on or about 15th Dec. 1865 pursuers shipped at Amsterdam, on board defrs'. screw-steamer Ivanhoe, 5453 loaves of sugar in good order and condition, for the purpose of being conveyed to Leith in terms of the bill of lading set out in the schedule; that the defenders did carry the said sugar to Leith in the said steamship, and did there deliver the same; that

the said sugar, when so delivered, was not in the like good order and condition in which it was when shipped at Amsterdam, but was damaged by breakage of some portion thereof; but whether, by reason of the damaged condition of the said sugar when delivered, defrs. must be held in law to have committed a breach of their contract with pursuers, the jury were ignorant, and prayed to be advised by the Court;" and further, finding that it had not been established by evidence, what was the immediate cause of the damage sustained by the said sugar in the hands of defrs. They assessed the damages at L.55, reserving to enter up the verdict for pursuers or defrs. according as the Court should be of opinion in point of law that, in respect of the facts above found, defrs. had or had not committed a breach of the contract embodied in the bill of lading. In consequence of an equal division among the Judges of the First Division, the case was argued before the Judges of that Division and three Judges of the Second Division.

The LORD PRESIDENT, after stating the circumstances in which the controversy arose, said—One or two principles of law which are applicable to this case may be said to be beyond dispute. (1.) In the ordinary contract of carriage, whether by land or water, there is in the contract an absolute obligation on the carrier that he must carry and deliver the goods in the like good order and condition in which he received them; and that if they are delivered in a damaged condition the carrier is liable for that damage without inquiry into the cause of it. It is also clear that under a bill of lading in the ordinary terms the responsibility of the shipmaster is of the same character, with the exception only of damage or loss caused by the act of God or the Queen's enemies. This exception means that, if loss has been caused by what is otherwise called in our law *damnum fatale*, or by the Queen's enemies, the shipowners are not liable; but it lies on the shipowners to prove that it was caused by one or other of the excepted causes. So, if you extend the number of exceptions of that kind, as is done in the present case, it will still be on the shipowner to relieve himself from liability by proving that the loss was occasioned by one of the excepted causes. Here various things are thus excepted; and it would certainly be unreasonable, where the shipowner undertakes in general terms to deliver, that the owner of the goods, who has meanwhile been out of possession, and without any control over them, should have to negative in evidence all the causes excepted in the bill of lading. That is an obligation which, in fact, he could not implement. If we were at present engaged in the construction of this class of exceptions, I should hold the onus to lie on the shipowner, and that he was liable, unless he could prove that the loss was caused by one of such excepted causes. But the peculiarity and difficulty of the case arises on a different clause which occurs in an unusual place, and looks like an afterthought—I do not mean an afterthought in framing this bill of lading, but in framing the form of bill of lading according to which this has been drawn up. It is stated in one part of the bill of lading, as I read it, that the shipowner shall not be answerable for breakage. There can be no doubt that the persons who are not to be so answerable are the shipmaster and owner. "Breakage" can't mean that they are not liable for breaking the sugar themselves. I am dealing as favourably as possible with the pursuers when I say that the word is not used in an active sense, and that it means that the shipowners are not to be liable for the broken condition of the goods. The shipowners are plainly not to be liable for the state of the goods at the time of delivery. This is in one sense an exception, but

not in the same sense as the other exceptions. When the goods are produced in that condition, they are brought within the exception. It was argued, and I think successfully argued, for the defenders that, although not answerable for breakage in this sense, the shipowner will be so answerable if the breakage is the result of his own fault; whether of his gross fault, or of the mere neglect of ordinary diligence, it is not necessary for the decision of this case to inquire. The only question, then, that remains is, whether it lies on the defenders to prove that the broken condition was not brought about by negligence for which they are liable. In my opinion the carriers have not that burden laid upon them. It lies on the owners to show that there was such fault. The reason for this is that the liability to which carriers are subject for negligence which results in the breakage of the goods intrusted to them, does not lie on them in their character of carriers. It is a liability lying upon every custodier of goods, and is imposed by a rule of common law broader than any principle applicable to carriers alone, and the negligence out of which it arises has to be proved according to the ordinary rule by the party alleging it. His Lordship, therefore, thought the verdict must be entered up for the defenders.

Lord Cowan differed.

Lord Curriehill concurred with the Lord President.

Lord Deas held it was an unreasonable construction of the bill of lading to hold that the shipowners, who have the absolute control of the goods out of sight and out of reach of the owners, are to be free unless the latter can prove actual fault; that the real difficulty he had had was to see what benefit the shipowners took from the exception of breakage, if that word were construed (as he thought it must be) to mean breakage arising otherwise than from their own fault. But it was plain that, if it were not excepted, they would be liable if it occurred by pure accident. Now, if they prove that it took place by pure accident they are free. This alone was a large innovation on the common law of carriers.

Lord Benholme and Lord Neaves concurred with the Lord President, and Lord Ardmillan with Lords Cowan and Deas.

The Court thus, by a majority of one, gave judgment entering up the verdict for the defenders, and assoilzieing them from the conclusions of the action.

Act.—Moncrieff and Lancaster. Agents—Messrs Wilson, Burn, and Gloag, W.S.——Alt.—Gifford and M'Lean. Agent—P. S. Beveridge, S.S.C.

PURVES *v.* BROCK.—*July* 9.

Advocation—Competency—Sheriff Court—Proof.

This is an advocation of a judgment of the Sheriff of Sutherland and Caithness pronounced, in an application at the instance of the advocator Purves, against the respondent Brock, for delivery of a tup alleged by the advocator to have been purchased by him at a sale of farm-stocking at Stainland, and to have been removed by the respondent. The petition bore that the price paid for the tup by the advocator was £3 5s. The defence to the action was (1) that the respondent had really purchased the tup, and (2) that the petitioner had in any view a mere personal claim for delivery against the seller, and had no title to sue the respondent for delivery. The Sheriff-Substitute, after a proof had been led, ordained the respondent to deliver the tup to the petitioner; but this judgment was, on

appeal, reversed by the Sheriff-Principal, who held that the advocator must fail in his application, as no right of property in the tup had passed to the advocator. Thereupon, the advocator brought the present advocation.

When the case was called in the Short Roll last week, it was objected for the respondent that the advocation was incompetent, in respect the value of the cause was under £25, as appeared from the advocator's statement in the original application, to the effect that the price of the tup was £3 5s. To-day, the Court repelled the objection, holding that, although the value of a cause might be ascertained from an examination of other parts of the pleadings than the conclusions of the summons (or the prayer of the petition), the price of the tup was not necessarily any criterion of its value, and that, for all that appeared to the contrary, the tup might have been of much greater value to the advocator than £3 5s, or even than £25.

Counsel having been then heard on the merits, their Lordships recalled the Sheriff's interlocutor, and ordained the respondent to deliver the tup to the advocator, and found the advocator entitled to expenses both in the Court of Session and in the Sheriff Court.

The LORD PRESIDENT commented very strongly on the way in which the Act of 1853 was set at naught in this case by the practitioners in the inferior court, the proof in this paltry matter about a sheep having extended, in direct violation of the Act, over a period of three months.

Act.—Black. Agent—D. Forsyth, S.S.C.——Alt.—Solicitor-General, M'Lennan. Agents—Morton Whitehead, and Greig, W.S.

PTN.—KEITH MACALISTER.—*July* 10.

Entail—Improvement Expenditure—Drainage Act.

This was a petition under the Entail Amendment Act (11 and 12 Vict., cap. 36) for leave to constitute and charge certain improvements executed by the petitioner on the entailed estate of Glenbarr. By the sixteenth section of the Act it is provided—"That where an heir of entail in possession of any entailed estate, holden by virtue of any tailzie dated prior to the 1st day of August 1848, shall, whether prior or subsequent to the passing of this Act, have executed improvements on such estate of the nature of the improvements contemplated by the said last-recited Act (the Montgomery Act, 10 Geo. III., cap 51), but shall not have obtained decree therefor in terms of the said Act, by reason of the provisions thereof not having been adopted or not having been duly complied with, it shall be lawful for such heir to apply by summary petition to the Court in manner hereinafter provided, setting forth such improvements and the amount of money, not exceeding the amount authorised by the said Act, expended thereon, and praying the Court for authority to grant bond of annual rent," &c.

Part of the improvements was executed with money borrowed under the Drainage Act of 1846, by which the Treasury was authorised to make advances to proprietors on the security of the land, repayable in twenty-two years by instalments of £6 10s. per cent. per annum. Section 38 provides that heirs of entail "as between such person and the persons in remainder or reversion" shall be bound to pay the half-yearly payments of the rent-charge.

The petitioner has paid the rent-charge for about sixteen years, and offered to redeem the remainder in the manner provided by the Drainage Act.

Mr Webster, to whom the Lord Ordinary remitted to report on the improvements, disallowed those executed under the Drainage Act. The petitioner objected. A curator *ad litem* was appointed, and argued in support of the report; and the Lord Ordinary repelled the objection. On a reclaiming-note, the First Division ordered written argument to be laid before the whole Court. Lord Barcaple thought the objection should be sustained, and the prayer of the petition granted. The other consulted Judges concurred in the judgment of the Lord Ordinary. At advising, the Court (Lord Curriehill dissenting) adhered.

Act.—Gifford, Crawford. Agent—George Cotton, S.S.C.
Alt.—Blair. Agent—Jas. Finlay, S.S.C.

MACKAY *v.* EWING AND OTHERS.—*July* 10.

Trust—Power—Judicial Factor—Petition—Competency.

This case came before the Court by a petition at the instance of Mrs Mackay, wife of Captain Mackay, and daughter of the late John Russell, Esq. of Balmaad, praying the Court to award to her an annuity, out of the trust-funds, and to authorise the judicial factor on the estate to pay it to her. Mr Russell died in 1819, leaving considerable property, both heritable and movable, and also a trust-disposition and settlement appointing trustees to carry out the purposes of the trust. The trustee among other provisions appointed his trustees to pay his daughter a free yearly annuity of £50 during her life, "or until she comes eventually to have possession of the trust funds, in virtue of the succeeding clause of the deed," with power to his trustees, "if his funds would admit, and if they should think she has occasion for it, eventually to make some addition to said annuity, according as their own good judgment and discretion should suggest." The trustees declined to accept, and the petitioner served to her father, and entered into possession both of the heritable and movable estate. She appointed her husband factor, and she remained in possession until 1840, when a judicial factor was appointed on the estate. Since that date, four judicial factors have been appointed by the Court, and the estate is now under the management of Mr John Allan, solicitor, Banff. Answers were put in by Mrs Ewing, the petitioner's daughter, the leading beneficiary under the trust, who opposed the petition, on the ground that the petitioner and her husband were due large sums to the estate, on account of their intromissions during the nineteen years of their management, and by the judicial factor, who, without opposing the petition, stated certain considerations that were proper for the Court to hold in view in disposing of it. The leading one of these was that the petitioner had never accounted to him for her intromissions.

Last year, the Lord Ordinary (Mure) appointed the factor to pay the petitioner an annuity of £50, and this judgment was acquiesced in by Mrs Ewing. The petitioner afterwards moved for an increase to her annuity, which was again opposed by Mrs Ewing on the same grounds as before. The Lord Ordinary, proceeding on a calculation as to what might be the probable results of an accounting between the factor and the petitioner for the period of her intromissions with the trust-funds, increased the annuity by £100, and appointed the factor to pay her a yearly annuity of £150.

Against this interlocutor Mrs Ewing reclaimed, and maintained, in addition to the reason relied upon in the Outer House, that the petitioner was indebted in large sums to the estate, that it was beyond the jurisdiction of the Court to grant the prayer of the petition, because it was incompetent either for the factor, or for the Court on an application from the factor, to exercise the discretionary power conferred by the truster on his trustees to raise the petitioner's annuity above £50, if they thought proper. The Court felt this to be a question of considerable difficulty and delicacy, but avoided consideration of it by holding that the prayer of the petition was altogether incompetent either as a step in the factory or as a separate proceeding. The proper course for the petitioner to have followed was to apply to the factor, who would consider the case, and who might apply to the Court for special powers to increase the annuity if he thought proper. If the factor refused the application, and declined to ask powers from the Court, the petitioner might then perhaps directly apply to the Court, but her course, in the first place, was to apply to the factor. The interlocutor of the Lord Ordinary awarding the additional sum of £100 was accordingly recalled.

Counsel for the Petitioner—Mr Inglis, W.S. Agents—H. & A. Inglis.
Counsel for Mrs Ewing—Shand, Thomson. Agent—A. Morison, S.S.C.
Counsel for the Judicial Factor—W. A. Brown. Agent—J. C. Baxter, S.S.C.

MERCER *v.* ESK VALLEY RAILWAY COMPANY.—*July* 11.

Interdict—Railway—Landlord and Tenant—Servitude.

This was a note of suspension and interdict at the instance of Mr Mercer, of Gorthy, proprietor of Kevock Mill, near Lasswade, against the respondents proceeding further with a railway siding, loading bank, wall, and access to loading bank, which they are constructing on part of the complainer's land; and also against the Shott's Iron Company, who have leased an extensive mineral field from Sir George Clerk, and for whose use the siding is chiefly intended. The questions involved related to a piece of ground admittedly the property of Mercer, and to the use of the road now the access to Kevock Paper-Mill and the mill lands, and formerly used as access to Kevock Mill when it was the corn-mill of the barony. It was admitted that a part of the ground in question was beyond the boundary of the ground which the Esk Valley Railway Company gave notice that they would take under their Act. The company attempt to create a title by a sub-lease of the road from the tenant of the mill, Mr Tod. The Lord Ordinary on the Bills granted interim interdict on caution, holding that the use to which the ground is to be applied by the railway company is an inversion of possession, and at variance with the uses for which the property had been let; and, therefore, that the sub-lease was beyond the power of the tenant to grant. His Lordship, therefore, thought that the complainer was entitled to have the road restricted in the meantime to its use as a road to Kevock Mill, and to interdict against proceeding further with the siding during the trial of the question of right. The railway company reclaimed; but the Court adhered.

Act.—Clark and Shand. Agents—Tod, Murray, & Jamieson, W.S.
Alt.—Decanus, John M'Laren. Agents—White-Millar & Robson, S.S.C.

SECOND DIVISION.

HUNTER *v.* COCHRANE.—*June 7.*

Division of Commonty—Title—Possession.

In 1764 a predecessor of the pursuer, who is proprietor of Easter Colzium, obtained a decree in the Court of Session, finding "that he had a good right of commonty in the lands of Broadbent." Upon this decree and his titles, the pursr. raised this action of division of commonty for the purpose of having Broadbent, which lies between Crosswoodburn, the property of the defr., and Easter Colzium, divided between the defr. and him, in terms of the Act 1695, cap. 38. The defender pleaded, *inter alia*, that, assuming the pursuer's predecessor to have had a right of commonty in Broadbent in virtue of the decree, it had been lost by the pursuer, and the exclusive property in Broadbent acquired by the defender, by the negative and positive prescriptions. A proof as to possession was led, and the L. O. (Jerviswood) pronounced an interlocutor, finding that pursuer had failed to prove that since 1764, or for forty years prior to the date of the present action, he, his predecessors and authors, had possessed the lands of Braidbent or Broadbent, as common property, by pasturing sheep, horses, and cattle, casting feal and divot, or any other acts of commonty, as stated on the record. *Secundo*, That the defender had established, as matter of fact, that for forty years and upwards he, his predecessors and authors, had had possession, by themselves, their tenants, and others, of the said lands, by pasturing sheep and cattle, by killing game thereon, and by excluding the pursuer, his predecessors, and authors, from using the same for such purposes, and otherwise; and, with reference to these findings, his Lordship assoilzied the defender. The pursuer reclaimed.

The Court recalled the interlocutor, and remitted to the Lord Ordinary to proceed with the action.

The LORD JUSTICE-CLERK.—The decree of 1764 established a right of common property in the defender. It is possible that the effect of such a decree may be lost by the operation of the negative prescription, where no right under it has been exercised for forty years, and where, at the same time, the positive prescription has run in favour of the other party by his having possessed exclusively for the same period. But here it is clear the pursuer has continued to make use of the subject, particularly for pasturage; and when he holds the decree, that use must be attributed to his proprietary right, and not looked upon as a mere servitude. Had the question of property now come to be tried for the first time, the matter would have been quite different. But, after the decree, it is not the question who has exercised the most acts of possession, but whether the pursuer has had no possession at all.

Lord COWAN concurred.

Lord BENHOLME concurred. His Lordship thought a declaratory decree of this kind ascertaining the nature of feudal titles could not be lost by the negative prescription at all, but only by the positive.

Lord NEAVES concurred. He was not prepared to say that the negative prescription had no application here. Lord Glenlee had used the term in the Sleepless case, which was very similar. But, at all events it was not enough without the positive.

Act.—Mackenzie, Maclean. Agent—Wm. Traquair, W.S.——Alt.—Fraser, Duncan. Agents—Jardine, Stodart, and Frasers, W.S.

FLEMING *v.* BURGESS AND ROLES—*June* 12.

Bankruptcy—Trustee—Payment—Discharge—Assignation of security—Registration of Leases Act 1857.

Burgess had granted to Fleming an assignation of a lease of heritable subjects in security of a debt. Burgess afterwards became bankrupt, in 1864. Fleming presented this petition to the Sheriff of Inverness, under the Registration of Leases Act 1857, craving to be put in possession of the subjects. After the sequestration, petr. acquired right to another debt, secured by a decree following upon an adjudication led against the same subject in 1862. Roles, the trustee in bankruptcy, offered payment of the first debt, which was preferable, upon assignation of the security. Petr. maintained that the tr. must be satisfied with a simple discharge. The S.S. and Sheriff decided in favour of petr. On advocation, the L. O. reversed, holding petr. bound to grant the assignation. Petr. reclaimed.

LORD JUSTICE-CLERK said the tr. was entitled to this assignation, in order to use it for the benefit of the body of creditors, and prevent the postponed heritable securities from becoming preferable when the first was paid. A cautioner who paid a debt was entitled to such an assignation; and he thought the position of the trustee here was similar. The second debt and security must not be taken into view, as they were acquired after sequestration. Possibly, had they been acquired before sequestration, the petr. might have refused the assignation.

The other Judges concurred.

Act—Clark, H. Smith. Agents—Hagart & Burn Murdoch, W.S.—— *Alt.—Watson, Trayner. Agents—Murdoch, Boyd. & Co., W.S.*

LINDSAY AND LONG *v.* ROBERTSON AND OTHERS—*June* 18.

Mussel Scalps—Title—Barony—General Clause of Fishings—Possession—Res juris publici—Interim interdict.

Suspension and interdict by proprietors on the river Eden to interdict fishermen of St Andrews from gathering mussels from the mussel-scalps on the north side of the river. Susprs. found on a barony title with a general clause of fishings, which they maintain is a title upon which they can prescribe a right to mussels, and on leases as evidence of their exclusive possession. Respts. say they have right to take mussels anywhere between high and low water mark, on the shores of navigable rivers, as being *juris publici*. They further rely on a grant of land with mussel-scalps adjoining, to the Mags. and community of St Andrews, which, they say, entitles the inhabitants to take mussels from the adjoining scalps; and they contend that that grant carries them to any of the mussel-scalps on the river, because they form one continuous connected estate. They also aver possession. Susprs., besides their title and possession, found on a compromise fixing the Eden as the boundary between the town and the proprietors, agreed to in a litigation in the Sheriff Court in 1804. The case came up before the L. O. on the Bills (Mure), who granted *interim* interdict, on condition that complrs. should supply the fishermen with mussels at 1s. per basket pending the trial of the question of right, and bind themselves to repeat the sums so obtained if they were ultimately found wrong. The Court adhered. The Judges, however, reserved their opinions on the merits.

LORD JUSTICE-CLERK—We must look at two points—the present state of possession, and the effect of giving or withholding the interdict. Here, I

think, complrs.' exclusive possession for half a-century is established by the leases. The respts. say possession without a title must be disregarded, and deny that a barony with a general grant of fishings constitutes a sufficient title. I give no opinion upon that point, which is still open. But I should have required to be satisfied of the negative before inverting the present possession. Further, to recal the interdict would be very injurious to complrs. if they are ultimately successful. In the opposite event, they will not suffer by it to anything like the same extent.

Lord COWAN concurred.

Lord BENHOLME concurred. Complrs.' title was impeached. No doubt the Crown can grant a right of property in the scalps. This has been recognised in cases, and in 10 & 11 Vict., making the taking of oysters from private scalps a theft. Whether the general title will carry scalps is *sub judice*.

Lord NEAVES concurred, but reserved his opinion even as to the possibility of appropriating scalps. The preamble of an Act would not alter the law. Respts. founded on their title as giving a private right, which was inconsistent with their other contention that it was a public right; and if it was a private right, they had given it up by the compromise.

Act.—Young, Watson, Balfour. Agents—Dundas & Wilson, C.S.—— Alt.—Decanus, A. R. Clark, W. A. Brown. Agent—Andrew Beveridge, S.S.C.

INSPECTOR OF POOR OF KINGLASSIE PARISH *v.* KIRK-SESSION OF KINGLASSIE.—*June* 13.

Poor—Parochial Board—Kirk-Session—Poor-Law Amendment Act, Sect. 52.

Question whether a farm purchased in 1724 belongs to the heritors and kirk-session, on behalf of the legal poor of Kinglassie, or is vested in the kirk-session exclusively, for the purpose of distribution, according to their discretion, amongst the poor persons in the parish, whether possessing a legal right of relief or not. The funds with which this purchase was made appear to have been accumulations from donations, collections, fines, and other sources, described in the minutes of kirk-session as being in "the poor's-box." The active administration of these funds had been taken by the kirk-session of the parish. But the minutes show that, posterior to the proclamation of 11th August 1692, by which the heritors and kirk-session had the duty of providing for the relief of the poor laid on them jointly, the heritors had more or less intervened in the administration of the poor funds. In 1726, part of the funds were applied to the purchase of the farm of Ramore by the minister and a committee of elders, with approval of the kirk-session and heritors. The disposition was not recovered; but its terms are shown by those of the instrument of sasine, and of a charter of confirmation granted by the superior. The disposition was in favour of the then minister, and certain elders specially named—"elders and members of the kirk-session of Kinglassie, and their successors in office, from time to time, as ministers and elders of the said kirk-session, for the use and behoof of the poor of the said parish."

Defenders maintained that the disposition imported a conveyance to the kirk-session as a separate administrative body, altogether apart from the heritors of the parish, and for the purpose of a discretionary distribution

amongst poor persons in the parish, whether legally entitled to relief or not; that it bore this import so clearly that it was not open to be interpreted, far less controlled, by intrinsic evidence. Pursuers contended, and the L. O. held, that the history of the fund must be looked at, and that it was clear from the evidence that the property was not intended to be dealt with in a different way from the poor funds of the parish generally. His Lordship found that at and prior to the passing of the statute 8 and 9 Vict. cap. 83, the property libelled belonged to the heritors and kirk-session of Kinglassie, for behoof of the poor of the said parish. On a reclaiming note, the whole Court were consulted, and unanimously adhered to the Lord Ordinary's interlocutor.

Act.—Sol.-Gen. Millar, W. M. Thomson. Agents—J. & H. G. Gibson, W.S.——Alt.—Gifford, Macdonald. Agent—John Thomson, S.S.C.

HEBON *v.* CALEDONIAN RAILWAY COMPANY—*June* 19.

Tender—Acceptance—Mora—Statutory Arbitration.

Defrs. took from the pursuer a piece of land under their statutory powers. A reference was made to an arbiter to fix compensation. After claims and answers had been lodged, defrs.' agents wrote to pursuer's, on 12th March 1866, tendering L.450 and expenses in full of pursuer's claim. It was added —"This tender, if not accepted, is not to be founded upon, or disclosed to the arbiter, until the question of expenses comes to be considered by the arbiter" On 30th March, an inspection of the ground by the arbiter took place in presence of counsel and agents. On 25th April an acceptance of the tender was intimated, and immediately repudiated on the part of the defenders. The pursuer sues upon the accepted tender as an enforceable contract. The L. O. assoilzied, holding that the tender had not been accepted timeously; that the pursuer could not found upon his acceptance after so long a time as forty-four days, especially as he had proceeded with the submission in the meantime. The pursuer reclaimed, but the Court adhered.

Act.—Clark, Johnstone. Agents—Marshall & Stewart, S.S.C.——Alt. —Young, Gifford.—Agents—Hope & Mackay, W.S.

JOHNSTON *v.* PETTIGREW.—*June* 14.

*Heritable Security—Assignation—Registration—*8 *and* 9 *Vict., c.* 31, *s.* 1 *—Titles Act* 1858.

This case arose upon objections by Pettigrew, to a scheme of ranking made up by Johnston, as trustee on the sequestrated estate of Struthers. The objector claimed preference in respect of two bonds and dispositions in security acquired by the bankrupt in 1856, in corroboration of the disposition to him of the lands of Craighole. Struthers was infeft in the lands; but the sasine made no reference to the assignation of the bonds, and the assignation to them was not recorded in terms of 8 & 9 Vic., cap. 31. Struthers conveyed lands and bonds in 1859 to the objector by a disposition and assignation *ex facie* absolute, but alleged to have been in security of advances. That deed was registered under the Titles to Land Act, 1858, (21 & 22 Vict. c. 76; but the registration was reduced as a title to the lands by a judgment of this Division, June 16, 1865, 3 Macph. 954.

It was now maintained by Pettigrew that, although the registration gave no title to the lands, it was a good registration of the bonds under 8 & 9 Vict. c. 31, S. The trustee made up a separate title to the bonds by a notarial instrument under 21 & 22 Vict. c. 76, s. 14. He maintained that the bankrupt's right to the heritable securities having remained merely personal, there had been no valid transference of the real right to Mr Pettigrew by recording of assignation in terms of the 8 & 9 Vict., cap. 31, sec. 1, that Act enabling such transmission to be effected only by a creditor infeft; and that transmissions of inchoate rights to heritable securities (now completed by notarial instrument under the Act of 1858) were not within the operation of the Act of 1845. He also pleaded that the bonds had been extinguished *confusione* when they came into the person of the proprietor of the lands, but this plea was not disposed of. The Lord Ordinary (Mure) gave effect to the contention of the trustee, repelling the objections to the scheme of ranking and division, and approving of the same.

The Lord Justice Clerk.—The question resolves, wholly into the matter raised under 8 & 9 Vict., as to the power under that Act of the holder of a personal right to heritable securities to convey them to another, so that registration by that other party may complete a real right in him. It was argued that the trustee, by completing his own title, completed the bankrupt's right, validated the right in Struthers, and made the right of his assignee, the objector, complete by accretion. But it is impossible to listen to that, because the trustee did not make up his title to these bonds through a completion of the bankrupt's title to them.

The Act of the 8 & 9 Vict. was among the first, of a series of conveyancing statutes which effected very beneficial changes. It provides (quotes s. 1.) The right, which may be transferred in the short statutory method, is the right of the creditor therein—that is, the right of the creditor in the heritable security so constituted may be transferred, and, the assignation being registered, the heritable security shall be transferred precisely as if sasine had followed upon an assignation. The creditor is defined to be, in the 12th clause, 'the party in whose favour the heritable security is granted, or who is in the right thereof,' and the transference is of the right as vested in the creditor. Its completion by registration completes the right in the assignee which was previously in the granter of the assignation. The right of the party who gives the assignation is transferred to the registered assignee just as if he had expede sasine. There is nothing as to a transfer which does not proceed from a party in the real right to the security; and as the necessary effect of registering the assignation is to put the assignee in the position of a party whose right has been completed by sasine, so it must be that the party who transfers has a real right in him previous to the transfer, which, being communicated and followed by registration, gives a real right to the assignee. The transmission of inchoate rights to be made complete, not in the person of the assignee, but of some party who may have a title from the assignee uninfeft, is not within the statute. The possibility of transmitting a right to securities in the old form, so that, after a series of transmissions of the original precept, an infeftment taken at last, would complete the right, cannot affect the construction of this Act. It may be that a larger remedy might have been desirable; but I cannot find any such thing in the statute.

Reference was made to the schedules. Sched. No. 1 presupposes infeftment in the granter, 'all as specified in the bond and disposition in

security, and instrument of sasine thereon.' Note *a* requires a statement of all the intermediate holders after the first. The assignees, if the statute is of the import stated, must mean registered assignees.

In schedule No. 3 the case is given of an instrument in favour of an heir of a creditor who is assumed to die infeft in the security, and as to whom it is said that he acquired right by general or special service. It is plain that some peculiar meaning or effect is attached to the words 'general service.' They can hardly be said to justify the inference that a personal right must be contemplated, as a general service is the appropriate mode of service in reference to such rights. In the case supposed, the ancestor is infeft, and where infeft, special service is necessary. The words must there, I think, be either disregarded, or read as Mr Guthrie suggested, as applicable to the case where a general service is used, not as taking up a right, but to fix and ascertain who is in a particular relation.

The other judges concurred.

Counsel for Johnston—Gifford, Guthrie. Agent—D. J. Macbrair, S.S.C. ——*Counsel for Pettigrew—Clark and Lancaster. Agent—John Ross, S.S.C.*

MACLEAN & HOPE *v.* MUNCK.—*June* 21.

Process—Relevancy—Averment—Bill of Lading—Short Delivery.

Pursuers were onerous indorsees of a bill of lading of a cargo of bones shipped from Genoa to Leith. The quantity delivered was much below what was specified in the bill of lading, and this action was brought against the shipowner on the ground that the bill of lading is conclusive evidence of the amount shipped in his vessel, and which he was bound to deliver. The bill was signed by the master. Pursuers did not expressly aver that the quantity in the bill of lading was actually shipped, and declined to move for leave to amend their record to that effect. Action dismissed as irrelevant, in respect that it was not averred that the quantity contained in the bill was actually shipped.

Act.—Jameson, Gifford, Asher. Agents—White-Millar & Robson, S.S.C.——*Alt.—Clark, Watson. Agents—Murdoch, Boyd, & Co., W.S.*

LONDON AND CALEDONIAN MARINE INSURANCE CO. *v.* LONDON AND EDINR. SHIPPING CO. AND DUNDEE PERTH, AND LONDON SHIPPING CO.—*July* 4.

Process—Issues—Alternative Actions—Liability of Carrier.

Pursuers were assignees of the owners of a cargo of jute shipped on board the Temora from London to Dundee, and lost at sea in that vessel. They paid the value of the cargo to the owners. Pursuers first brought an action for the value against the London and Edinburgh Co. as owners of the Temora. A defence having been stated that the Co. had not contracted to carry the jute, having let the vessel on hire to the Dundee Co. for the trip, and had nothing to do with the cargo, pursuers raised a supplementary action against the Dundee Co., which was conjoined. Pursuers proposed issues in identical terms against both defrs. Objected that, as such issues would be contradictory to each other, they could not be granted. The Court allowed the issues, holding that if the pursuer chose to go to trial against two defrs., by one of whom he must be defeated, and incur expenses, that was a competent course.

Lord NEAVES had some hesitation, and doubted whether the precise

course had ever been followed before. It was different from calling several defrs. jointly, and averring that they, or one or more of them, were liable.

The issues approved of were two, in identical terms against each company—

Whether, in or about February 1865, defrs. [the London and Edinburgh Shipping Co.] received on board the screw steamship Temora the various quantities of jute mentioned in the schedule hereunto annexed, and undertook to carry the same from London to Dundee and to deliver the same at Dundee to the parties entitled thereto? and whether, in breach of said undertaking, the said defenders failed to deliver the said jute, or part thereof, at Dundee, to the loss, &c.

Act.—Gifford, Shand. Agent—James Webster, S.S.C.——Alt.—Decanus, Duncan. Agents—Horne, Horne, & Lyell, W.S., and M'Ewen & Crament, W.S.

TEIND COURT.

JAMIESON AND OTHERS *v.* MIN. OF ORWELL AND OTHERS.—*June* 19.

Teinds—Valuation of Stock by Teind—Approbation.

Approbation brought by heritors of the parish of Orwell, concluding (1) for approbation of a report by the Sub-Commissioners for Dunfermline Presbytery, dated 8 Feb. 1630, so far as it concerns an alleged valuation of the lands of Middleton of Cullenoquhies, which is in these terms:—"The Middletoun of C. is worth of yearly rent, in stok by teynd, 40 bolls victuall—thairof 10 bolls bear and 30 bolls black aits:" (2), for declarator in terms of the report that the stock of the said lands should be now and in all time coming the quantities of victual set forth in the report, and the teind parsonage and vicarage one-fourth thereof. The minister (who could not find any free teind except by getting rid of the valuation, pleaded (1) That the sub-valuation did not value the stock and teind jointly, or the teind separately, the only modes of valuation authorised by the Commission of 2d February 1629, but only valued the stock, which gave no means of estimating the teind. (2.) That the minister was not called in the proceedings before the Sub-Commissioners. Cases were ordered. [Authorities—Connell, App. 95, 118; 1633 c. 19; 1633 c. 17; Gordon *v.* Dunbar, Mor. 15,741; Mutter, M. App. Teinds 2; Connell, i. 176; Campbell *v.* Paton, Connell i. 244; Brown *v.* Stewart, 31 Jan. 1851; Kirkwood *v.* Grant 7 Nov. 1865; Connell i. 171; Stair ii. 8, 14; Elchies ii, 469; Ersk. ii. 10, 33; Somerville *v.* Lauderdale, M. 15,764.]

Lord CURRIEHILL reviewed the terms of the Commissions, statutes, and decisions, and held that three modes of valuation were authorised by the Commission of 1629, one being a valuation of stock alone, where the titular failed to adduce evidence of the amount of drawn teind. His lordship was inclined to presume at this distance of time that the minister was called, if that was necessary, but that his absence, if proved, was not fatal.

Lord BENHOLME concurred as to the second objection; but held that the Commission of 1629 gave no power to Sub-Commissioners to be satisfied

with a valuation of the stock alone, that the decisions founded on were in valuations before the High Commission, and that the adoption of one-fourth of the stock for the teind was only introduced there as a penalty on heritors failing to lead proof in the usual way. That mode of procedure was inapplicable to a sub-commission, which could lead proof for themselves.

Lords Justice Clerk, Deas, Ardmillan, and Barcaple concurred with Lord Curriehill, and the Lord President, Lords Cowan and Neaves with Lord Benholme.

The Court thus, by a majority of one, granted decree of approbation.

Act.—Dundas, Cook. Agents—Leburn, Henderson, and Wilson, S.S.C. ——*Alt.—Horn, Cheyne. Agent—John Rutherford, W.S.*

HIGH COURT OF JUSTICIARY.

(Full Bench.)

HALLIDAY *v.* BATHGATE.—*May* 31.

Summary Procedure Act—Tweed Fisheries Act—Appeal—Jurisdiction—Conviction.

Suspension of a conviction before the Sheriff of Peebleshire for a contravention of the Tweed Fisheries Act (20 and 21 Vict. c. 148). The proceedings were under the Summary Procedure Act (27 and 28 Vict. c. 58). It was not disputed by the suspr. that by sec. 3 of the latter the provisions of that act would have been applicable to the offence charged had that clause remained unqualified. But it was contended (1st) that whereas sec. 29 provided that nothing in the Act should confer upon the Sheriff another more extensive jurisdiction than he would otherwise have had, yet, by prosecuting an offence against the Tweed Fisheries Act under the Summary Procedure Act, the Sheriff's decision, which, under secs. 93-8 of the Tweed Act, might be appealed to the Circuit Court of Justiciary, became final, because there was no provision for appeal made by the Summary Procedure Act. 2d, At least the Sheriff's decision could not be reviewed on the merits, because the evidence could only be reviewed if a record of it was kept on the demand of either party, as provided by sec. 93 of the Tweed Act; but, by sec. 16 of the Summary Procedure Act, it was declared not to be necessary to keep any record of the evidence adduced. Therefore the complaint had not been competently brought under the Summary Procedure Act, and the conviction should be quashed.

The LORD JUSTICE-GENERAL, who delivered judgment, said that, as the third clause of the Summary Procedure Act authorised the application of its machinery to cases of this kind, while the 29th section forbade the extension of the Sheriff's jurisdiction, if the suspenders were correct in maintaining that the application of the Summary Procedure Act would make it impossible to review the Sheriff's judgment at all, or at least upon the merits, though an appeal was provided by the Tweed Fisheries Act, then the two sections would be inconsistent with each other, and the Court

would have to choose between them—the general rule being that the last clause expressed the latest mind of the Legislature. The Court, however, was of opinion that the employment of the Summary Procedure Act had not the effect of making the Sheriff's jurisdiction more extensive by exempting it from appeal. There was no clause in that Act taking away an existing right of appeal, or which could be construed as repealing the secs. of the Tweed Fisheries Act which provided the appeal. Still, appeal on the merits might be taken away, if the record of the evidence were abolished, by means of which alone it was practicable to judge whether the conviction was justified by the evidence. But he thought that the words of sec. 16, by which it was made "not necessary" to preserve a note of the evidence, did not dispense with the record so absolutely as to repeal the imperative words of the former statute. Therefore the suspr. might have had a record of the evidence if he had asked for it in the Inferior Court. The suspension must be refused. No expenses, the case being the first of the kind.

Act.—W. N. Maclaren. Agent—J. M. Macqueen, S.S.C.——Alt—Clark, W. A. Brown. Agents—Mackenzie, Innes & Logan, W.S.

CARRUTHERS & WYLIE *v.* JONES.

Catching Salmon in close time—Adjournment by single justice—Conviction—Alteration of Libel.

Case certified from Dumfries Circuit Court. Appeal from conviction by Justices for unlawful catching of salmon in close time with poke-nets. Besides pleas on the merits, the main grounds of suspension were—1st, That the case had been adjourned from the 5th to the 12th Jan. by a single Justice. Sec. 12 of the Summary Procedure Act, under which the prosecution was conducted, provided that there should be no adjournment unless the Court thought fit to order an adjournment. Not less than two Justices could form the Court, as not less than two could try the case. 2d, The conviction, though signed by the Justices, did not contain their names and designations in the body of it in the usual manner.

The LORD-JUSTICE CLERK thought the appeal should be dismissed. Every Court had the power of adjournment—(Bruce *v.* Linton, Nov. 30, 1860, 23 D. 85.) A single Judge could adjourn a diet of the High Court of Justiciary when there was not a quorum. In proceedings like the present, it was the Court that was authorised to issue warrants of citation and apprehension, and these duties were performed by a single judge. The omission of the names, if it was of any importance, was met by sec. 34 of the Summary Procedure Act, which enacts that convictions are not to be quashed on immaterial points of form. As to the pleas on the merits, there was no record of the evidence, and therefore no materials before the Court.

The other Judges concurred.

Act.—Watson & Nevay. Agent—Robert Finlay, S.S.C.——Alt.—Clark & Johnstone. Agent—James Steuart, W.S.

JACKSON *v* JONES.

This case was similar to the preceding, with the additional plea that the Justices had allowed the prosecutor to alter the libel, and substitute the 11th for the 12th October as the date of the offence. The Court held this point to be immaterial. The appellants did not aver he was misled. It was covered by the 34th section. Appeal dismissed.

MALCOLM *v.* PATTERSON.—June 8.

(Before Lords Justice-Clerk, Cowan, and Neaves).

Conviction—17 Geo. III. c. 56—*Embezzlement of Yarn.*

Suspension of a conviction before the Justices of Peace of Forfarshire, under the Embezzlement Act, 17 Geo. III. c. 56, on the ground (1.) That the oath of the informer and the warrant to bring up for examination did not specify sufficiently the materials alleged to be embezzled, which were merely described as "certain purloined and embezzled materials of flax used in the linen manufacture;" (2.) That the justices did not ask the informer to state specific facts inducing the suspicion libelled; (3.) That there had been oppression in the way in which the materials after they were seized had been dealt with, inasmuch as they were mixed up without labels, so that it was impossible for the suspender, after the lapse of a year, during which no steps had been taken in the case, to recognise the parcels, or account for his having them in his possession; (4.) That twelve months had elapsed after an appeal on a preliminary point to the High Court, before the proceedings were resumed; (5.) That the Justices had rejected an appeal to the Quarter Sessions on the ground that at the time of making the appeal the suspender had neither found recognisances, in terms of the 20th sec. of the Act, nor had gone to prison. The Court held that the first four objections were not well founded; but that the Justices had proceeded on an erroneous interpretation of the statute in holding that the appeal had had no operation except under the conditions referred to. The panel had not been required to go to jail or to enter into recognizances when he took his appeal, and he was not bound to do so unless so required. The Quarter Sessions ought, therefore, to have heard the case on the merits, and the Court accordingly remitted to them to proceed with the case according to law, granted interim warrant of liberation, and found no expenses due in the circumstances.

Act.—Black. Agent—D. Curror, S.S.C.——Alt.—Scott. Agent—James Nisbet, S.S.C.

PTN.—PIRRIE.—*June* 8.

Interim Liberation pending Appeal to Quarter Sessions.

The petr. was convicted in May before Justices of Peace for Mid-Lothian under the Cruelty to Animals Act (13 and 14 Vict.), and Summary Procedure Act, and sentenced to six weeks' imprisonment. He appealed to Quarter Sessions, which to in July following, and presented this petition for interim liberation pending appeal. The complainer urged that if he were to remain in prison until the meeting of Quarter-Sessions he would suffer a longer imprisonment than that to which he was sentenced. The chief question on which the Court desired argument was the competency of the appeal to the Quarter-Sessions. But finally their Lordships held it unnecessary to dispose of this question.

Lord COWAN said it was a question of discretion for the Court, which might be entertained if there were reasonable grounds for it, notwithstanding any doubts which might exist as to the propriety of the form (that of a petition) which it was presented. The question was one of great delicacy. The ground of the application was that an appeal to the Quarter Sessions had been taken. Such an appeal was not expressly given by the statute,

but it was said to exist at common law. The Court did not wish to express any opinion as to this application; it was not satisfied, indeed, that it could judge of that matter at all; or, indeed, that it was necessary to do so. A *prima facie* case had been stated for the petr., which he might be able to substantiate when the competency of the appeal came to be discussed before the Quarter Sessions.

The Court pronounced an interlocutor whereby, the Fiscal not opposing, and without prejudice to any objections to the competency of the appeal, it granted warrant of liberation in the meantime, the petitioner finding caution to return to prison in the event of the Quarter Sessions sustaining the conviction.

Act.—Mair.——Alt.—A. R. Clark.

(Before Lords Justice-Clerk, Cowan, and Deas.)

LOWE *v.* BUCHAN.—*June* 10.

*Suspension—Conviction—*13 *and* 14 *Vict. c.* 33*—Citation—Police.*

Susp. of conviction by Mags. of Stirling, under General Police Act 13 and 14 Vic., cap. 33. Complr. averred that, having been asked to appear to give evidence regarding certain stolen property, on his arrival in Court he was placed in the dock and charged with reset of theft; and that, having been taken by surprise, he was unable to conduct his defence, convicted and imprisoned. He contended that the only competent methods of arraigning a party for trial under the act were (1) citation, and (2) apprehension, and that the proceedings were oppressive. [Robinson *v.* Mackay, 21st July 1846, Arkl. 114; Ritchie *v.* Pilmer, 20th Dec. 1848, J. Sh. 142; Blyth *v.* M'Bain, 20th Feb. 1852, J. Sh. 554; Gray *v.* M'Gill, 27th Feb. 1858, 3 Irv. 54; Cogan *v.* Anderson, 16th Dec. 1854, 1 Irv. 588.] Susp. refused. If complr. desired delay, he ought to have asked for it at the time.

Act.—Scott. Agents—Lindsay & Paterson. W.S.——Alt.—J. Marshall. Agents—A. J. Dickson, S.S.C.

(Before Lords Justice-Clerk, Neaves, and Jerviswoode.)

HAMILTON *v.* GIRVAN.—*June* 15.

*Summary Procedure Act—*26 *and* 27 *Vict. c.* 115*—Informer—Title to Complain—*11 *and* 12 *Vict. c.* 43.

Susp. of conviction by Justices of Ayrshire under Poisoned Flesh Act 1864 (26 and 27 Vic., cap. 115). Respt. is farmer at Kildonan Mains, of which suspr. is proprietor, and the offence charged was laying down by his gamekeepers poisoned flesh or meat, "in or upon the lands of Kildonan, in the parish of Colmonell, and more particularly in or upon lands in the vicinity of Kildonan House." Obj. that the instance of the complaint was bad, for want of concurrence of the P. F., and also because it did not set forth any sufficient interest in the prosecutor, the Act not giving the right to prosecute to any one of the public; (2) That the complaint did not specify either the *locus* or the offence with sufficient precision. [Authorities: Hume ii., 125, 119; 11 and 12 Vict. c. 43; cases in Barclay's Digest, 210, 215; Herbert *v.* D. of Roxburgh, 2 Irv. 346.]

Lord NEAVES—The question was the effect of sec. 31 of Summary Procedure Act as operating on the English Summary Procedure Act (11 and 12 Vic., c. 43), and through it on the Poisoned Flesh Act, and Poisoned Grain Act, 26 Vic., c. 113, sec. 25 of which as to recovery of penalties, was incorporated with the Poisoned Flesh Act. The intention was no doubt to make the penalties in both these Acts primarily pecuniary, the punishment of imprisonment being only the result of non-payment of the fine. In their first conception both acts were enforceable at the instance of common informers. No doubt this was their effect in England, and there could scarcely be a doubt as to Scotland. It was shown by the terms of sec. 5 of the earlier Act, which provides "that 11 and 12 Vic., c. 43, shall extend in England and Scotland to all proceedings under this Act, and it shall not in any such proceedings be necessary to allege or prove the ground or other place where an offence is committed to be the property of or occupied by any person: Provided always that the convicting Justices or Sheriff may, if he or they shall think fit, award to the informer or prosecutor (not being a police constable or a peace officer) in any such proceedings, any portion not exceeding one moiety of any penalty recovered under the aforesaid enactments," &c. If we refer to the Act 11 and 12 Vict., c. 43, it seemed quite plain that this clause contemplated an information by a common informer. His Lordship could not say there was in the Poisoned Grain Act itself a substantive enactment giving the penalty to the informer, the latter part of the section quoted being rather a corollary proceeding on the assumption of such a power having been already given, as it had been by the reference to 11 and 12 Vict. It might be contended that the words "informer or prosecutor" were used loosely, or were intended, *applicando singula singulis*, to apply to England and Scotland; but this was not probable. An offence of a very peculiar kind was constituted by the section —one which consisted, not in doing something injurious, as is the usual character of offences and crimes under the common law of Scotland, but something merely dangerous. This being so, you get out of the proper criminal law into the category of police regulations. This was the case of one who had done an act only likely to result in damage; and there was, therefore, strictly speaking, no one having a special interest to prosecute; and if the title of a prosecutor under the Act could not be sustained on the ground of interest, it could only be as a common informer. It was said, however, that all this was now taken away by sec. 31 of the Summary Procedure Act. No doubt a great deal was taken away, but the language was equivocal. There was no proper repeal of anything; but it was enacted that where by any Act of Parliament the 11 and 12 Vic., cap. 43, was applicable to complaints or informations under that Act, the provisions of the said 11 and 12 Vic., cap. 43, shall not be applicable to any proceedings under such Act when instituted in Scotland, but the provisions of this Act only—*i.e.*, the Summary Procedure Act. This took away the form of procedure; but did it take away the right to commence the prosecution? It rather assumed the existence of that right. It was not possible to suppose that it took away the right to prosecute given by the Poisoned Grain Act to a common informer. The presumption was that it only altered the forms of proceedings, without changing the rights of parties as to their radical *jus actionis*. This view was confirmed by sec. 4 of the Summary Procedure Act, and the Procurator-fiscal, if he prosecuted under the Poisoned Grain or Poisoned Flesh Acts, would do so as a common informer

only. As to the relevancy, there was no difficulty in repelling the objection.

Lord JERVISWOODE and the LORD JUSTICE-CLERK concurred. Susp. refused.

Act.—Hope. Agents—Hope & Mackay, W.S.——Alt.—Clark. Agent —L. M. Macara, W.S.

HOUSE OF LORDS.

WESTERN BANK OF SCOTLAND v. BAIRD'S TRUSTEES, AND JAMES BAIRD, *June* 4.

(In the Court of Session, July 14, 1866, 4 Macph. 1071).

Competency—Appeal—48 Geo. III., c. 151—*Remit to Accountant—Enumerated Causes.*

Two actions of damages by Liquidators of the Western Bank against Wm. Baird, now insisted in against his trustees, and James Baird, formerly directors of the Bank, for losses alleged to have been sustained by the Bank in consequence of the defenders' negligence. The Court of Session remitted the case before further answer to an accountant to examine the books, &c. Afterwards the Court refused leave to appeal. The pursuers appealed.

The LORD CHANCELLOR (Chelmsford) in giving judgment, said that this was an appeal from part of an interlocutor which remitted to an accountant to report on the state of the accounts upon which the present action was raised; and the respts. took a preliminary objection that no such appeal was competent. He (the L. C.) thought the objection ought to prevail. By the 48 Geo. III. c. 151, it was provided that no appeal should be allowed against an interlocutory judgment of the Court of Session, but that an appeal should be only against interlocutors on the whole merits of the case, unless the Court gave leave to appeal, or differed in opinion. The appts. did not deny that this interlocutor did not exhaust the whole merits of the case, but they said that the statute did not apply, because the Court had no jurisdiction to deal with such a case, except simply to remit it to be tried by a jury. The action was founded on the delinquency, or *quasi* delinquency, of the directors, and it was said, was one of the enumerated causes which the Court of Session had no option but to send to trial before a jury. Now, whether it was one of the enumerated cases or not, it was competent for the Court to send it to an accountant for investigation, in order to simplify the matters alleged, and to enable them to prepare it the better for trial. That was a mere matter of procedure which the Court below was the proper Court to decide. The Court had not decided anything as to the merits of the case, and it might be that the propriety and expediency of the present interlocutor would be a proper subject for a future appeal when final judgment should be given; but at present the House could not say that it was not a proper and expedient course for the Court below to pursue. The House could not at the present stage go beyond the interlocutor and deal with the merits. Even if the Court of Session had erroneously decided that it had jurisdiction when it had none, that objection could only be taken when the final judgment should be pronounced in the Court below.

Lord CRANWORTH concurred. Whether the Court below had taken the most prudent course in doing as they had done, might be a future subject of inquiry; but at present it was incompetent to appeal, and it was a mere confusion of terms to say that the Court below had no jurisdiction to do what they had done.

Lord COLONSAY said that from the first this case seemed to him to be free from difficulty. The statute conclusively showed there was no right of appeal at present, and there could not be a shadow of doubt as to the jurisdiction of the Court below to make such an interlocutor as this. Even if they had erred in some step of the procedure directed by the statute, it was an extravagant and unwarranted proposition that an appeal on that ground would be competent. To hold this was running counter to the practice under the statute for the last sixty years, and contrary also to principle as well as precedent. There might be difficulty hereafter in settling the relevancy of the action, but all that had yet been done was to call in the aid of the accountant to enable the Court to read with his eyes the various averments founded on the state of the accounts. It was a provident and a competent course for the Court below to take, and it was enough to say that at present an appeal was incompetent.

Appeal dismissed, with costs.

Act.—Att. Gen. Rolt, A. B. Shand. Alt.—Decanus, Young.

ENGLISH CASES.

COMPANY—*Prospectus—Misrepresentation.*—A shareholder cannot file a bill on behalf of himself and all other shareholders seeking particular relief on his own behalf and also general relief on behalf of the other shareholders.—Distinction between a misrepresentation in a prospectus issued before, and one issued after registration of the memorandum and articles of association.—A prospectus contained a statement that certain persons, who had agreed to act, were directors of a company, but they in fact refused to act before the allotment of plaintiff's shares:—*Held*, per Wood, V.C., that this was not a fraudulent misrepresentation affording ground for relief. A prospectus, issued after registration of articles of association, stated that the company would commence operations with ships of a certain class and number:—*Held*, that as the applicant must have known that, under the articles, the directors could deal as they pleased with reference to the starting or non-starting of the company, he was not entitled to relief on bill filed against the directors and company for indemnity in respect of his shares, but the bill as to this dismissed, without costs. *Semble*—The majority of the original subscribers to the memorandum of association may nominate directors without holding a meeting to appoint such directors.—*Hallows* v. *Fernie*, 36 L. J. Ch. 267.

COMPANY—CONTRIBUTORY—*Forfeiture of shares.*—Articles of association provided that if a shareholder should neglect to pay any call, the company might give notice of forfeiture, and that if default should be made in payment, the directors might pass a resolution to forfeit the shares, and that upon an entry of such forfeiture being made in the books, and notice thereof given to the shareholder, the shares should become the property of the company. A shareholder being in default, notice of forfeiture was given. The shareholder did not pay. There was no evidence that any resolution was passed; but entries were made in the company's books that the shares had been forfeited, and that they had been transferred from the name of the shareholder into that of the company. No further notice was given to the shareholder, but he was treated by the company as no longer a member:—Forfeiture held complete, and on the company being after-

wards wound up, the shareholder's name ordered to be taken off the list of contributories as a present member.—*North Hallenbeagle Tin and Copper Mining Co., ex parte Knight*, 36 L.J. Ch. 317.

DEBENTURE—"*Undertaking.*" *Receiver or Manager.*—An ordinary debenture of a railway company in the form of Schedule C. of the Companies' Clauses Consol. Act, 1845, gives the holder a charge on the undertaking generally and on the tolls and sums of money earned by the company, but gives no specific charge upon the lands of the company, whether those upon which the railway is constructed or surplus lands, or upon the rolling stock. The railway was mortgaged as a going concern, and is not to be interfered with or broken up by the mortgagees. The right of the mortgagees is to have a receiver of the earnings of the company only, and not to have a manager appointed by the Court. A charge given by directors on moneys arising from the sale of surplus lands belonging to the company, for a debt owing by the company, held to be valid. Per Lord Cairns, L. J., "This Court does not assume the management of a business or undertaking, except with a view to the winding up and sale of the business or undertaking. The management is an *interim* management; its necessity and its justification spring out of the jurisdiction to liquidate and to sell; the business or undertaking is managed and continued in order that it may be sold as a going concern, and with the sale the management ends. To the management of the undertakings of the L. C. & D. Ry. Co., assumed by the V.-C.'s orders of the 12th and 17th July, 1866, no limits, short of repayment of the whole debenture debt could be assigned; for it has not been and could not be contended that there would at the hearing of the cause be any power of selling the undertakings. But in addition to the general principle that the Court of Chancery will not in any case assume the permanent management of a business or undertaking, there is that peculiarity in the undertaking of a railway, which would, in my opinion, make it improper for the Court to assume the management of it at all. When Parliament, acting for the public interest, authorizes the construction and maintenance of a railway, both as a highway for the public, and as a road on which the company may themselves become carriers of passengers and goods, it confers powers and imposes duties and responsibilities of the largest and most important kind, and it confers and imposes them upon the company which Parliament has before it, and upon no other body of persons. These powers must be executed, and these duties discharged, by the company. They cannot be delegated, or transferred. The company will, of course, act by its servants, for a corporation cannot act otherwise, but the responsibility will be that of the company. The company could not by agreement hand over the management of the railway to the debenture-holders. It is impossible to suppose that the Court can make itself or its officer, without any Parliamentary authority, the hand to execute these powers, and all the more impossible, when it is obvious that there can be no real and correlative responsibility, for the consequences of any imperfect management." . . . "Surplus land may arise in one of two ways: it may be land originally taken by the railway company in the expectation that it would be required for their line, or for stations and works; or (and this is the origin of by far the greater quantity of surplus land), it may be land which the owner, under the provisions of the Lands Clauses Act, has forced the company to buy, that he may not have a severed part of a tenement or field left on his hands. In either case the company is obliged to resell the land within a limited time, applying the proceeds to the purposes of their Act, on pain of the land revesting in the original owner, who, if the land be not in a town, is to have the first option of repurchase. It is obvious from this that the surplus land is, in truth, the representative and equivalent of a portion of the capital provided by the company for the execution of their works, which has, not for the purposes of profit, but for protection of landowners, been temporarily diverted, and which is to return to the capital of the company when the object for which it has been diverted has been accomplished. And, as regards the *interim* rents, if any, of surplus lands, they appear to be in the same position as the income arising from capital provided by the company and temporarily invested in any other manner until needed. . . . A railway

is made and maintained by means of its capital, its borrowed money, its land, its proceeds of sale of surplus land, its permanent way, its rolling stock. All of these may be said in a sense to be connected with, to be parts of, to make up the undertaking. If a mortgage of the undertaking carries *in specie* the sale moneys of surplus lands, it must equally, and on the same principle, carry *in specie* the ordinary land of the company, the capital, the permanent way, the rolling stock —nay, even the very money itself lent on the mortgage. The assignment made by the mortgaged debentures is immediate, and is to continue for three years at the least. If the debenture-holders are right in their argument, they became immediate assignees *in specie* of all the ingredients which I have enumerated as going to make up the undertaking, and they might, from the first, have asserted their rights as mortgagees by taking and impounding not merely the proceeds of surplus lands, but the capital, cash balances, rolling stock, and even their own money advanced. Now the great object which Parliament has in view, when it grants to a railway company its extraordinary powers over private property, is to secure in return to the public the making and maintaining of a great and complete means of public communication; and yet, according to the necessary consequence of the plaintiffs' argument, the moment the company borrowed money on debentures, it would depend on the will or caprice of the debenture-holder whether the railway was made at all. I may further observe that in any sense in which the sale moneys of surplus lands can be considered part of or moneys arising from the undertaking, calls made and paid subsequent to the debenture must be equally a part of or moneys arising from the undertaking. And yet sec. 38 of the Companies' Clauses Act, 1845, and the form of the mortgage in the schedule, clearly assume that under the words of debentures, such as those now before us, future calls would not pass; and sec. 43 provides that even when future calls are expressly included, the company may (unless the contrary is provided) receive the calls and apply them to the purposes of the company. The argument, again, of the debenture-holders goes, in fact, to claim for them the same position, as if, under the term "undertaking," they were mortgagees of the whole property and effects of the company, and, indeed, the prayer in the bill of "Gardiner (No. 2)" uses the words "property belonging to or connected with the undertaking." Now there is nothing in the Companies' Clauses Act, 1845, to prevent the company borrowing both on land and mortgage; and sec. 44 provides that the bondholders "shall be entitled to be paid out of the tolls or other property or effects of the company;" words which in *Russell* v. *East Anglian Railway Company*, 3 *Mac. and Gor.* were held to mean that the bondholders might obtain a judgment, which, under sec. 36, would be executed against the property of the company. But, according to plaintiffs' view, the whole property and effects of the company, being all parts of the undertaking, would be assigned and mortgaged by the debentures, and thus the right apparently given to the bondholder and judgment creditor would be merely illusory. It must be evident that, if the plaintiffs' argument be correct, very grave differences of opinion and of interest might arise among the debenture-holders. Some might desire to arrest the continuance of the undertaking and to obtain repayment out of the capital or other moneys provided for the works; while others might consider that their most hopeful chance of repayment would be by the expenditure of these moneys so as to earn tolls and profits; and it would be difficult in such a case to see any common interest in the body of debenture-holders such as would enable one to maintain a suit on behalf of all. As regards the effect of the word "undertaking" in these securities, we gain but little information from the definition given in the Acts of Parliament. In the two public Acts, the Companies Clauses and the Lands Clauses, the "undertaking" is defined to be the "undertaking or works by the special Act authorized to be executed;" and in the private Acts the object appears to be not so much to describe what is included in the word "undertaking," as to divide by metes and bounds or otherwise the various undertakings of the company from each other. The object and intention of Parliament, however, in the case of each of these various undertakings was clearly to create a railway, which was to be made and maintained, by which tolls and profits were to be earned, which was

to be worked and managed by a company according to certain rules of management, and under a certain responsibility. The whole of this, when in operation, is the work contemplated by the Legislature, and it is to this that, in my opinion, the name of "undertaking" is given. Moneys are provided for and various ingredients go to make up the undertaking; but the term "undertaking" is the proper style, not for the ingredients, but for the completed work; and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the "undertaking" is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal effect of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing completed; as a going concern, with internal and Parliamentary powers of management not to be interfered with; as a fruit-bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature must not, under a contract pledging it as security, be destroyed, broken up, or annihilated. The tolls and sums of money *ejusdem generis*,—that is to say, the earnings of the undertaking, must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot under their mortgages, or as mortgagees, by seizing, or calling on this Court to seize, the capital, or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed. I ought not to omit to notice a point much pressed—namely, that as by sec. 127 of the Lands Clauses Act, the sale moneys of surplus lands are to be applied to the purposes of the special Act, and as the payment of overdue debentures ought to be taken to be the first duty of a company, therefore the debenture-holders have a right to sustain a suit for this application of the sale moneys in payment of the debentures. There is no doubt that if the company were to use these sale-moneys in paying debentures they would be acting in accordance with their powers; but even admitting that paying debentures is a purpose of the special Act, there are many other purposes, and the directors, and not the debenture-holders, must, in my opinion, be the judges to which of several purposes the moneys are to be applied. Whether if a company, after mortgaging the undertaking, were to apply their capital or other moneys which ought to go into and improve the undertaking to purposes wholly foreign to the undertaking, they could be controlled by debenture-holders is a question which may at some time have to be considered, but which does not arise in the present case. The observations which I have made show that, in my opinion, no distinction should be made between the sale moneys and the interim rents of surplus land."—*Gardiner, Drawbridge, &c.*, v. *London Chatham and Dover Ry. Co.* 36 L.J., Ch. 323.

COMPANY—*Winding up: Bills of exchange: Set-off.*—The holders of dishonoured bills of an insolvent company, being also acceptors of other bills not arrived at maturity, which are in the possession of the official liquidator of the company, are not entitled under the Companies' Act 1862, s. 95, to have their acceptances retained by the official liquidator and not negotiated until due, when a right of set-off would arise. Holders of dishonoured acceptances of a company which is being wound up cannot, either at law or in equity, set-off the present liability of the company upon such acceptances against a future liability of themselves on other bills accepted by them, and which the company holds. Nor does set-off in bankruptcy apply to such a case.—*Commercial Bank Corporation of India and the East, ex parte Smith, Fleming, & Co.*, 36 L.J., Ch. 333.

BANKRUPTCY—*Policy of assurance: Assignee: Notice.*—W. having mortgaged a policy of insurance on his own life, became bankrupt, and died four years after the bankruptcy. The mortgagee gave notice to the insurance office and claimed the proceeds of the policy. No previous notice had been given of the mortgage or of the bankruptcy:—*Held*, that notice after the bankruptcy was insufficient, and that the policy remained in the order and disposition of the bankrupt. No act of an assignee for value after bankruptcy can give validity to his assignment as against assignees in bankruptcy.—*Webb's Policy*, 36 L.J., Ch. 341.

THE

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ENTAIL IMPROVEMENTS.

WITHOUT entering upon the general subject of the policy of entails, we wish to draw attention to a special point arising out of the Montgomery and Rutherfurd Acts, which, because productive of hardship, is felt not the less but the more because it falls unequally and accidentally.

The Montgomery Act (10 Geo. III. c. 51), the first to remove any of the asperities of the early entail law, provided that an heir in possession who laid out money in certain operations for the improvement of the lands or mansion-house of an entailed estate, should be a creditor of the succeeding heirs of entail to the extent of three-fourths of the sum so expended,—the expenditure by one heir not being effectual to constitute such claim for more than four years' free rent, in the case of improvements upon the lands, and two years' free rent in the case of the mansion-house. Machinery was provided for constituting these claims so as to make them effectual against the next heir, and other machinery was provided by the Rutherfurd Act (11 & 12 Vic. c. 36), which, without repealing the previous method, provided two other modes of recovering a proportion of improvement expenditure, viz. an annualrent for 25 years out of the lands at an advanced rate of interest (7 1-10th per cent.) upon three-fourths of the sum expended,—and a bond and disposition in security, with power of sale, over the fee of the estate, for two-thirds of the sum expended.

The particular kinds of improvement thus authorised are defined in sections 9 and 27 of the Montgomery Act, namely: enclosing,

planting, draining, erecting farm-houses and offices or outbuildings for the same; building a mansion or offices or repairing or adding thereto. To these have been added by the Rutherfurd Act, sec. 20,—private roads made through any entailed estate, or by means of immediate access thereto; and by the Cottage Act of 1860 (23 & 24 Vic., c. 95), erection of cottages for the labourers, farm-servants, and artizans upon entailed estates.

This exhausts the catalogue of Montgomery improvements. But the Rutherfurd Act has authorised improvements of a more general description, commonly called *permanent improvements*, as that is the sole description by which they are pointed out in the Act. An heir of entail may (§ 26) apply to the Court for authority to uplift and apply, among other purposes, "in permanently improving" the entailed estate, "or in repayment of money already expended in such improvements," funds which would otherwise be applied to the purchase of additional lands to be entailed,—such as the proceeds of the sale of a portion of the estate, railway compensation money, or trust funds directed to be entailed. There is no restriction as to the nature of these improvements. It is only necessary that the money be applied in permanently improving the entailed estate.

There are thus two sets of entail improvements existing along side of, but distinct from each other,—permanent improvements not being necessarily Montgomery improvements,—and Montgomery improvements not being necessarily permanent improvements. Montgomery improvements are strictly defined. Rutherfurd or permanent improvements apply to the whole range of meliorations of a permanent kind which a proprietor can execute on his estate. The former are strictly, the latter liberally interpreted.

A few instances will show that this is not a difference of mere words. Thus, with a view effectually to drain unreclaimed or barren land, it is often necessary to trench it; yet trenching, even in the clearest cases of absolute necessity, and when accompanied with draining, has been held excluded by the terms of the Montgomery Act, where draining only is mentioned. In *Ramsay* (1852, 17 D. 74) L.754 had been expended in trenching 170 acres of barren land, and thereby rendering it productive; and in regard to nearly the whole of this sum, the man of skill reported that "it was not merely necessary to complete the improvement of the barren waste ground, but essential to render

the corresponding drainage operative and effective," and that the drainage expenditure would have been useless without uniting with it the process of trenching by pick and spade. *Farquharson*, 1855, 18 D. 1044, was a still stronger case. The Court, however, in both cases, disallowed the sums claimed, on the ground that the operations of trenching and draining are separate and distinct, and the latter only is mentioned in the statute.

These decisions are uniformly acted upon, and petitioners and reporters consider it hopeless now to bring the subject under the notice of the Court. Hence, though such claims to a large amount are often entered in the accounts of expenditure, they are rigorously struck off by the professional reporter. On the other hand, trenching is recognised as a permanent improvement in the sense of the Rutherfurd Act. *Skene* 1857, 19 D. 964, and *Gordon*, 1860, 22 D. 1503.

A similar difficulty has been felt in regard to embanking portions of estates to protect them against the encroachment of rivers or the sea. This has in some cases been overcome, by shewing that the embanking was necessary to, or was a means of *draining* or *enclosing*. But the judgments scarcely appear to be uniform, as will be seen from the cases of *Anderson* (9 Dec. 1852,) Duncan's Manual, *Kinnaird* (1849, 21 Jur. 406), *Baillie* (1850, 22 Jur. 582), and *Duke of Athole* (1851, 17 D. 1015), the two former being refused, and the two latter granted. In the Duke of Athole's case the interlocutor bore that the charge was sustained *as for drainage*, and in Mr Baillie's *as necessary for drainage*. These grounds very much resemble those on which trenching, as distinguished from draining, was disallowed. Such operations would no doubt be all reckoned, as they truly are, permanent improvements, and there would be no difficulty in having their cost defrayed from the sources pointed out in sec. 26 of the Rutherfurd Act, where such exist. A case of somewhat similar straining occurs in *Porterfield* (1853, 15 D. 428), where the cost of a loch in a sheep park, and a pond in a garden, were sustained as for drainage, the practical reporter stating that the "loch and pond, being the recipients of the drainage water of lands adjoining, are to that extent useful for the purpose of the drainage of the lands referred to, although other outfalls as suitable could have been obtained at less expense, but the lands and heritages would not have been thereby improved to the same extent. It is surely far from expedient that the granting of claims for valuable and

beneficial improvements should be perilled upon the fact that the operations are useful for other than their primary purposes. The law is thus left uncertain in its application, and parties are tempted to strain the facts of a case to correspond with the restricted language of the statute.

Again, the erection of farmhouses and offices being a Montgomery improvement, the cost of such buildings is readily granted, but shooting lodges are on a different footing, not being mentioned in the statute. Indeed, when the Act was passed they were no doubt seldom used except by the heir of entail and his friends, for a few weeks in autumn, when no great hardship would be felt that the comforts were not always such as might be had at home. Now, however, Highland estates have become exceedingly valuable, chiefly on account of their shootings, which are now constantly let on lease, and at high rents, implying and requiring good house accommodation. These rents too are not reckoned as mere perquisites of the heir in possession, but form part of the legal rents of the estate, and, whether the shootings be let or not, are included when calculations are made for family purposes, founded upon the rent of the estate (*Leith*, 1862, 24 D. 1059). On some estates the shootings produce as much or more than the agricultural subjects. But the cost of erecting shooting lodges has been uniformly rejected as a Montgomery improvement; and we cannot but think that the rule was very sternly applied in *Davidson* (1859, 21 D. 1086). Here the sum of £850, expended in erecting a dwelling-house and offices for the tenant of grazings and shootings, was disallowed, though there was a lease to a resident tenant, for the period of 17 years as to the shootings, and 19 years as to the grazings, at a rent of £620, of which £360 was applicable to the shootings, and £260 to the grazings. The Lord President observed—"It is not alleged that this house is a kind of building that would be proper and suitable for a farm-house, but that it serves the double purpose of affording accommodation as a shooting lodge, while it also serves as a farm-house to the tenant of the grazings—he being also tenant of the shootings. It does not appear to me that such a building falls within the description in the statute of a farm-house. It is something different and more extensive than a farm-house." And, to the suggestion that the Court should allow what would be suitable to a farm-house alone, he replied, "That seems a reasonable suggestion if we were here exercising legislative

powers." We are not aware that it has been decided that shooting lodges are permanent improvements in the sense of the Rutherfurd Act, but looking to the miscellaneous claims that have been sustained under that head, it cannot be doubted that they would.

If such claims as those above mentioned have been rejected, it is not wonderful that building a tile work, a thirlage mill, or a gamekeeper's house, constructing a well, erecting a steamboat pier to give access to an estate from the Frith of Clyde have met with the like fate. Upon the analogy of other cases all these would probably have been sustained as "permanent improvements." *Lockhart* (1852 14 D. 922) is a direct authority as regards a flour mill.

These instances have been cited, not on the ground that they should or could have been otherwise decided under the present statutes, but as illustrating the inequalities that have been inadvertently introduced by the legislature. It is to be remembered also that we have before us only a few of the multitude of cases of similar, or greater hardship, with which practitioners must be familiar in chambers. It is only the improvements that seem to have some resemblance in description to the language of the statutes that are seriously contested, and find their way into the reports, but many thousand pounds must have been beneficially expended upon entailed estates, of which the heir in possession finds it impossible to recover any part. Lord Curriehill said, in *Elliot*, 1861, 23 D. 882, "Permanent improvements" (and he uses the words in their popular sense) "on an entailed estate form in effect additions to the estate, and indeed additions more valuable to the heirs of entail as a body, than if additions were made to the extent of the estate by other lands being purchased with the money, and entailed on the same heirs; and therefore the heir who lays out his funds in making such an addition to the estate has a strong claim in equity to be reimbursed out of the estate so improved by him." But under the present statutes one heir of entail is able to obtain reimbursement in whole or in part of improvement expenditure, because, for example, a line of railway has been carried through his estate for the damage caused by which he gets compensation, which he is authorised to apply to repay the cost of improvements of whatever kind, if permanent; while his less fortunate neighbour, who has not recourse upon any such compensation money, cannot be reimbursed from that source,

and cannot charge the estate by annualrent or bond, because his improvements do not square with the precise language of the statute of 1770, when perhaps many of them were unknown and could not have been purposely excepted. The reason of the inequality is simply this, that an act nearly 100 years old fails to express in detail the various kinds of improvements which proprietors now-a-days find it advantageous to execute. Agriculture seems to have been the only source of revenue then contemplated from landed property, and even in this department there is not sufficient latitude to meet the various agricultural improvements and appliances which may beneficially be made. But what of estates whose revenues are derived from game, from fishings, from the growing of wood, from mills for grinding corn, &c., cutting wood, or carding wool, &c., &c., and from works of many other kinds? It may be much more remunerative and more suitable to the position and circumstances of the estate that such sources of revenue should be developed at much expenditure and with doubtful prospects, than that its agricultural capabilities should be developed. Yet the heir is entitled to reimbursement of expenditure for the agricultural improvements of the Montgomery Act, without regard to their permanency, for it has been more than once stated from the bench that Montgomery improvements "are not required to be of a permanent nature."* And on the other hand, an heir who seeks to develop the real resources of an estate is left to do so for the benefit of succeeding heirs all at his own cost, unless he is fortunate enough to get a windfall of money by bequest or a railway compensation claim. Of course, the natural effect of this is to discourage heirs of entail from executing such improvements at all.

We have not mentioned mines and quarries as subjects for which expenditure may be beneficially made, for as their working takes from the substance of the estate the next heirs of entail are not benefitted by anything that facilitates the operations, except perhaps the immediately succeeding heirs who continue the workings with the appliances furnished by their predecessor.

The remedy we venture to suggest for these anomalies is evident enough; namely, an enactment that all permanent improvements in the sense of the Rutherfurd Act be deemed improvements of the nature contemplated by the Montgomery Act, so that the

* Lord Curriehill in *Elliot, supra.*

heir may have all the means of reimbursement at present applicable only to the latter, and all the varieties of improvement at present confined to the former. It might perhaps be still better if Montgomery improvements, as such, were abolished, allowing, of course, the same operations to be charged, if truly permanent improvements. The effect of this would be to require permanency as an element in all entail improvements, which, as already mentioned, is not at present the case as to those under the Montgomery Act.

CURRENT CASE LAW.

The case of *Dickson* v. *Mathew*, 1st Div., June 28, was characterised by Lord Deas, who dissented, as one of great difficulty. It decides that a bond merely acknowledging the subsistence of former debts granted by a bankrupt within the sixty days before bankruptcy, not giving the grantee any preference over other creditors, but only enabling him to rank as an ordinary creditor in the sequestration *pari passu* with the lowest class of unsecured creditors, is not challengeable under 1696, c. 5, not being a deed "in farther security in preference to other creditors." The Lord President thought that this was not necessarily in conflict with the dictum of Mr Bell, Com. II. 213, that "from the moment of constructive bankruptcy the debtor can do no act by which the situation of his creditors can be altered, even to the effect of establishing equality among them," which was founded on as an authority by the trustee. It was held, however, that the grantee could not rank for interest upon the interest accumulated in the bond.

Hally v. *Lang*, 1st Div., June 27, teaches an important lesson in pleading, and is one of several recent warnings against the looseness with which records are sometimes framed in Sheriff Courts, and the improper indulgence with which such pleading is treated by Sheriffs. A petition for summary ejection of the widow of a deceased proprietor from premises which she had occupied for seven years under an *ex facie* good liferent right granted by her husband, did not allege that the possession of the respt. was vicious or precarious, and did not aver any other special ground for the exercise of the extraordinary remedy of summary ejection; but merely stated the title of the petitioner as trustee on the sequestrated estate of the son and heir of the respondent's husband, and that the respondent was in possession. It sometimes requires a considerable amount of tact and knowledge to state a relevant case, but we trust that instances of such gross inaccuracy as this are rare in any Court.

In *Purves* v. *Brock*, 1st Div., July 9, it was held that the price

paid for an article sought to be recovered does not conclusively fix the value of it, so as to ascertain the value of the cause in a question as to the competency of an advocation, because the value may be much greater to the possessor than to others. Thus the mention in the condescendence of the price paid for a tup which had been wrongly delivered to the defr. after a sale, and for delivery of which a petition was presented to the Sheriff, was held not to show that the value of the subject matter of the process was under L.25, and the respondent objecting to the competency of advocation, was therefore held not to have discharged the *onus* lying upon him by pointing to the admission on record. The Lord President animadverted strongly on the delays which had occurred in leading the proof in this case. It cannot be too constantly remembered in the Sheriff Courts that the Act provides "that the diet of proof shall not be adjourned unless on special cause shown, which shall be set forth in the interlocutor making the adjournment; and the proof shall be taken as far as may be continuously," &c.

In *Elliot*, &c., v. *Hunter*, &c. (Heritors of Kirkton *v.* Minister, &c.) July 12, the Second Division had occasion to consider the law as to the obligation upon the heritors of a parish to make additions to the manse, and they affirmed the principle established by the cases of Lochcarron and Symington (*Mackenzie* v. *Mackenzie*, June 30, 1835, 13 S. 1014, and *Carmichael* v. *M'Lean*, 25th May 1837, 15 S. 1020, 9 Jur. 458), and recently restated by Lord Jerviswoode in *Heritors of Kingoldrum* v. *Haldane* (Jan. 24, 1863, 1 Macph. 325), (1) that mere insufficiency of a manse in point of size to accommodate the family of the minister does not, at least where it has been at a not very distant date repaired or improved by the heritors, and not objected to by the minister and Presbytery as insufficient, entitle the minister to a new manse or to additions to the existing building, but (2) that where, as Lord Moncreiff expressed it, "the manse requires very considerable and universal repairs to render it habitable at all," or, as Lord Jerviswoode put it, it is "truly in such a state of disrepair as to be incapable of repair, or so nearly so as to render the expense of repair not far short of the expense of a new manse," it is not incompetent for the Presbytery to decern for additions as well as repairs. In this case the manse had been built so recently as 1840, and had been occupied without objection till 1857 by the late incumbent; and the repairs which were claimed, and which the heritors did not refuse to execute, were of course comparatively trifling. Lord Cowan observed that he would not say that the amount of repair required in order to justify the order for a new manse must be so great as to make that the only alternative, so that apparently the language of Lord Moncreiff above cited seems more nearly to express the view of the Court than the more cautious statement of Lord Jerviswoode, or than that of Bell, *Princ.* 1169. The principle is clearly enough but somewhat diffusely stated by Mr Duncan in his "Parochial Ecclesiastical Law," pp. 381, 382. The

present case and that of Kingoldrum in the Outer House are valuable chiefly as aiding in the application of the rule, which must in many cases be difficult.

The Breadalbane case has been terminated by a decision of the House of Lords in favour of Mr Campbell of Glenfalloch. The most obvious reflection, after reading the judgments in the Court of Session and Appellate Court, is, that only the greatness of the prize could have tempted to the long and hopeless struggle in which Boreland and his supporters have now been defeated. The decision of the Courts cannot be said to have evolved any new law, but the rules of the Scotch marriage law have been elaborated and elucidated in a most exhaustive manner by both courts, and so far at least as regards habit and repute marriages, have been placed on a more satisfactory basis of reason and justice than ever before. We are no bigoted admirers of the Scotch law of marriage; but we desire in any imperial legislation on the subject that the best parts of our system should not be sacrificed for the sake of mere uniformity, and in deference to the unreasoning prejudice of southern journalists.

It is rather absurd, though not surprising, that English critics, who know little of the case and nothing of the law, should make the Breadalbane case the text for sermons upon the urgent need of improvement in the marriage law. Even the *Law Times*, which ought to know better, chimes in with the cuckoo cry. It is to be regretted that the judgment of the House of Lords was not reported in the *Times* except in the most meagre and unsatisfactory way; indeed a report of the judgment of Lord Cranworth would have been the most thorough refutation of the leading article which occupied the space that should have been devoted to the opinions of the law lords. That judgment tended to show that in the particular point at issue the law of Scotland has the advantage of the law of England, and his lordship even seemed to admit the justice and equity of legitimation *per subsequens matrimonium*. But there is much reason to believe that even in England in similar circumstances the same decision would have been given. In fact the case was one of evidence and not of law. A multitude of legal points, some of them curious enough, cropped up here and there, and some were keenly contested; but the real question, the true solution of which has hardly ever been dubious, was whether there was sufficient evidence of the intention of the grandfather and grandmother of the present Earl of Breadalbane to take one another for husband and wife.

The only novelty which the most diligent legal students have discovered in the judgment of the Scotch Court was the doctrine laid down in the opinion of the present Lord President, Lord Neaves, and Lord Mure, that cohabitation and repute are not merely evidence of matrimonial consent, but are a legal mode of contracting marriage—a doctrine which received support from some *obiter dicta* in former cases, but was never before formally enunciated. This

view has been negatived, by the opinion of Lord Cranworth at least, in the Court of Appeal; but after all the difference between the two ways of stating the law is rather verbal than real. The practical difference is small between saying that cohabitation and repute *make* marriage, and that they *prove* it.

At a very early stage of the case it appeared that an important point was to be made of a rule of the Canon Law against marriage between persons who have committed adultery. It was very soon apparent, however, that, as Lord Barcaple put it, "the Act 1600, c. 16, is of itself a sufficient answer to the plea. . . . It implies that there is no impediment to the marriage where there has not been a divorce." Perhaps after all, even if the Canon Law rule had been adopted in the law of Scotland it would have had no application in this case. It is thus stated by Sanchez (De Matr. VII. 78. 1), "Duo sunt crimina quae matrimonium subsequens dirimunt, Prius est adulterium cum machinatione mortis alterius conjugis. Posterius vero adulterium cum fide data de contrahendo post conjugis mortem vel cum contractu matrimonii de praesenti cum adultera." Another question was raised which received considerable attention from the Canonists, viz., Whether it was necessary to the validity of any subsequent marriage of James Campbell and Mrs Ludlow that the death of Christopher Ludlow should have been known to them. There was no proof of this, but the difficulty was got over (see opinions of Lord Barcaple and the Lord Chancellor) by *assuming* that they must in fact have been acquainted with an event so important to them. The student of the Canon Law, if there be now any such, may be interested by the chapters of Sanchez dealing with similar questions. (De Matr. II. 35, &c.)

The historian of Law, or indeed any historian who traces the progress and the various forms of human thought, might make an instructive chapter upon the differences in the treatment of questions wonderfully similar by the ecclesiastical lawyers of the seventeenth and previous centuries, and the law lords of the nineteenth. Another and more curious parallel than those to which we have referred will be found in the case of *Longworth* v. *Yelverton*, in its last stage, House of Lords, July 30. It was there held that the Court will in its discretion refuse to sustain a reference to oath where the interests of third parties may be affected. Other grounds of judgment were stated, but that was the *ratio decidendi* chiefly relied on. We do not at present discuss the judgment, or consider the cogent arguments of Lord Deas against it; but refer to the doctrine of Covarruvias, *De Spons.* I. 4. 1. 5. After stating that the church had introduced a *presumptio juris et de jure* in favour of marriage where copula has followed upon spousals, he lays it down that this presumption cannot be overcome by the admission of the party "pro quo jus praesumit"; where at least either collusion may be suspected or the interests of persons not appearing in the cause may be prejudiced. He then proceeds to notice the opinion that "in causa matrimoni-

ali non esse deferendum juramentum actori ab ipso reo nec reo ab actore, etiamsi nullae essent aliae probationes, quando ex hoc juramento posset praejudicium alii quam deferenti inferri: cum ille, qui non detulit, contendat cum altero ex litigantibus matrimonium contraxisse vel contractum non tenuisse: si enim ex delatione alter juraret pro matrimonio et istud juramentum teneret; tertius, qui praetendit matrimonium cum litigante contraxisse maneret aliquo pacto elusus: sic etiam si ex delatione juramentum fieret contra matrimonium, tertius qui contendit matrimonium per eum cum altero ex litigantibus contractum, non valuisse, propter primum conjugium super quo litigatur, frustraretur suo jure quod forsan habet. Quo fit ut delatio juramenti, etiam ubi nulla adest probatio in causa conjugali, sed reus est omnino absolvendus, minime sit admittenda, quando ex illa delatione posset alii nocumentum aliquod inferri, qui tamen eandem litem minime tractat, ex ejus vero decisione sperat damnum aut commodum quoad propriam causam;" &c. Though not cited, Covarruvias states the case for Mrs Forbes quite as clearly and much more briefly than our modern judges have done.

The Month.

Disfranchisement of Agents.—In reference to the clause in the English Reform Bill disfranchising law agents employed by candidates at elections, the *Law Times* says:—We had hoped that the Lords would have rescued the Profession from the unmerited insult inflicted upon them by the House of Commons by disfranchising all solicitors whose professional services are retained at an election. The clause was based on the assumption that solicitors habitually vote for any party that will employ them, and that the vote is the object of the retainer—in plain terms, that they sell their franchise for a fee. Members of Parliament ought to have known that such an assumption is wholly false and unfounded. The solicitors are not for sale, either in boroughs or counties. They have principles, and they belong to parties, like other men; but their knowledge of law, their aptitude for business, and their necessarily extensive local information, peculiarly adapt them to be election agents, and they are retained exclusively with reference to their services, and not to their votes. If the retainer was the purchase of a vote it would be a very costly one, and the same money might be used much more profitably. Why, then, are they to be disfranchised? The object of the exclusion of agents was to prevent bribery under colour of employment. Notoriously messengers were engaged in multitudes, for no other purpose than, under the name of employment, to put money in their

pockets, and so buy their votes without liability to the penalties for bribery. It was right to prevent this to some extent by forbidding persons so employed to vote, and thus to destroy the motive for sham engagements. But it is quite otherwise with professional agents. They cannot be dispensed with. An election could not be conducted without their assistance, and they are so costly, that no candidate would employ more of them than necessity compelled. To enact that they shall not vote is an insult for which the parties to it should be called to account by those whom they have insulted. It is too late to repair the wrong now, but we trust the solicitors will not rest until this undeserved stigma shall have been removed from them.

Partnership—Liability of Law Agents.—Sawyer v. *Goodwin*, 16 L. T., N. S. 622, decided by Stuart, V.C., involves an interesting point in regard to the liability of the executor of a law agent for the fraud of that law agent's partner. In negotiating a mortgage on the property of a client, the partner of a firm of solicitors, who was entrusted with the whole business of the firm in London, fraudulently furnished to the mortgagee an abstract which concealed prior mortgages, upon which the mortgage was completed. The members of the firm of solicitors having all died, and all having proved insolvent except one, Goodwin, the persons interested in the mortgage claimed damages from the estate of Goodwin. It was argued against the claim that partners were not liable for fraud of which they were not personally guilty; and moreover that this was a case in which, if Goodwin had incurred liability, the remedy was only against him personally, the rule applying *actio personalis moritur cum persona*. The latter ground of defence is not of much practical interest in this country, where, leaving the subtle distinctions of the Roman Law, (see *Savigny Syst.* v., 47, *sq.*) it has been settled at least since 1809* *MacNaughton* v. *Robertson*, 15 F.C., 199; *Morrison* v. *Cameron*, *ib.* 279) that the civil action for reparation, grounded on delict, is not, like the penal action in criminal law, confined to the delinquent. The wrongdoer's representative is liable for reparation (*Bell's Pr.* 546). The question of partnership liability is also said in both English and Scotch books to be free from doubt; and indeed the argument for the defender was chiefly rested on the cases which distinguish fraud committed beyond the scope of the partnership business, an attempt being made to bring the case within *Harman* v. *Johnson*, 2 E. and B. 61, in which a transaction of this kind, where money was entrusted to a firm of solicitors for general investment, and not for a particular loan or mortgage, was found to be rather part of the business of a scrivener than of a solicitor. The law is quite clearly laid down in Clark *on Partnership and Joint-Stock Companies*, p. 253. The judgment of the Vice-Chancellor seems,

* It was so ruled as early as 1582, *Monro* v. *Wishart*, M. 10,337, and it is so stated by Ersk. iii. 1, 15; and Bankton iv. 24, 8. But doubt was afterwards thrown upon the principle by the case of *Syme* v. *Erskine* in 1801, M. Sup. & Vassal, App. 3, 4 Pat. App. 510.

however, to suggest a doubt as to the correctness of what must be held since *Cox* v. *Hickman*, 8 H. of L. Ca. 268, to be the fundamental principle of the law of partnership, viz., "that the relation of partners in questions of liability rests on the principle of agency. This," says the V. C., "may not be a very perfect mode of describing the principle upon which that liability depends; but certainly, as far as it goes, it is accurate enough. It is not suggested that the profit to be derived from the making out and delivery of this abstract was for the separate benefit of Williams, or that it was to be applied in any other way than as ordinary partnership profits." The V. C. therefore thought it was impossible, "upon the well understood principles of the law of partnership," not to hold all the partners liable for the breach of professional duty committed by Williams. A writer in the *Law Times*, adopting the principle of *Cox* v. *Hickman*, questions, on the other hand, the decision of the Vice-Chancellor:—

"If the theory of partnership liability is agency, the liability of one of the partners for the fraud of the other cannot be regarded as settled by decision any more than, we should submit, it is settled by principle. In Smith's Mercantile Law, the author learned not by courtesy, remarks, with his wonted caution, that 'the principal has been thought to be responsible, not merely for the negligence, but for the deliberate fraud of his agent committed in the execution of his employment, though without the principal's authority; as, for instance, by selling false jewels for true ones;' and he quotes the reason given by Lord Holt, that some one must be the loser, and he who confides in the deceiver ought, rather than a stranger, to be such loser. But in the Exchequer, in *Udell* v. *Atherton*, 4 L. T. Rep. N. S. 797, 7 H. & N. 172, on a sale by an agent of a log of mahogany represented by him as sound, with a fraudulent concealment of a defect, and an action of deceit brought against the principal, the court was equally divided: Pollock, C. B., and Wilde, B., holding that the principal was liable; but Martin and Bramwell, BB., the contrary. Bramwell, B., looked on the fraud as no part of the sale; no part of the contract—it was collateral to it; and thought that Lord Holt's reason affected the purchaser more than the principal. He reviewed all the authorities, ending with *Wilde* v. *Gibson* in the House of Lords. In like manner Martin, B., argued that the agent was not authorised to make the misrepresentation respecting the state of the log; and all that the principal did was to authorise him to sell it honestly. No doubt the principal afforded the occasion on which the fraudulent misrepresentation was made, but he did nothing more.

"Besides the opportunity of misappropriation by a member of a solicitor's firm as to mortgage money, cases have occurred of a like danger relating to money in court. Thus, in *Brydges* v. *Branfill*, 12 Sim 369, on a sale of estates under the direction of the court, the tenant for life obtained an order for payment out of part of it to him by fraud, to which the member of the firm who acted for him in the suit was privy. The Vice-Chancellor decreed all the members of the firm liable. Upon 'general principles,' with respect to liability, he could not distinguish the innocent members from the peccant members. They were all of them solicitors and officers of the court, and the court could not regard any division of labour as among themselves, but must look upon the act of the partnership towards the court as the act of all and every of them. The safety of the public required this. *Todd* v. *Studholme*, 3 K. & J. 324, was a case of the same description.

"The doctrine of partnership in fraud falls with peculiar hardship on solicitors, owing to the confidential relation subsisting between a partner and the client whose business is attended to by him, and the largeness, in many instances, of the interests involved.

"It is a standing tribute to the profession that, holding, as they do, men's fortunes and good names in their hands, they habitually deal with both as faithful stewards, and that an unjust steward in the law is seldom found. In one sense their interest in ascertaining the true bounds of partnership liability is small, but in another it is great. Notwithstanding, then, the cases above noticed supporting the doctrine of

liability for a partner's fraud, we venture to think that when partnership liability is rested on agency, as after *Cox* v. *Hickman*, and in the interest of jurisprudence, it should be rested. considerable doubt arises whether the foundation of all those cases is not sapped. The operation of law which would attach on an innocent person liability for the moral fraud of another, because those persons have agreed to share between them the profits of business, meaning of course honest business, and because the fraud is committed in the business, is repugnant to reason as well as to morals. Fraud is in its nature personal. There can be no technical participation in it. It is altogether out of the region of partnership."

Dundee Sheriff Court.—Among various improvements recently introduced in the conduct of business in this important local court, the system of publishing the motion roll and debate roll of each day in the morning newspaper has been introduced. This is only taking a hint from the *Times*, which has long published a list of the cases set down for hearing or decision in the Supreme Courts in London. We used to wonder why the Edinburgh and Glasgow newspapers did not copy in their morning issue the cases set down in the Court of Session Rolls of the previous evening; excluding of course the motions in the Outer House, which occupy too much space, and are not of sufficient importance. But at last we discovered that they abstained on the ground that their doing so might lead to frequent disappointments—the fact that a case is set down in the Inner House roll being no reason why it should come on. We understand that that reason does not apply at Dundee, and that the cases set down are invariably proceeded with. We observe in the slip with which we have been furnished, that there is also a brief record of "yesterday's business," comprising a note of the interlocutors by the Sheriff-substitute, and of papers lodged; and also a list of the cases to be heard before Sheriff Heriot at his sittings in July.

Obituary.—ROBERT WRIGHT, Esq., of the firm of Wright and Morrison, Writers in Greenock, Clerk of the Peace for Renfrewshire, died at his house in Kilblain Street, Greenock, on July 12. Mr Wright, who was a native of Dollar, came to Greenock in 1843, and shortly afterwards was admitted a procurator before the Sheriff Court. He was a sound lawyer and a safe adviser, possessing in a rare degree the confidence of his numerous clients. He took an active and prominent part in politics, having been from the first a warm supporter of Mr Dunlop, M.P. for Greenock, whose principal agent in election matters he became. In local politics, he was always on the side of liberal principles, and opposed to everything in the shape of high-handed government. In August 1863 he was appointed Clerk of the Peace for the County—an appointment which was received with much favour not only by his professional brethren, but by the community generally. He was at the same time nominated by Sheriff Fraser to be one of the substitutes to act in absence of Sheriff Tennent. He was a member and office-bearer of the Free Church. He was of a most genial and social disposition, and being ever ready to lend a helping hand to any one in distress, he had be-

come endeared to many who will miss not merely his warm and kindly sympathy, but his generous and liberal assistance.

JAMES MORTON, Esq., of Belmont, writer in Ayr, was the father of the profession in the west of Scotland. He was born in the parish of Loudoun in December 1776. He was eldest son of John Morton, manager of the Loudoun colliery, and of Helen Mac Math, his wife, daughter of Mac Math, wright in Galston, and Jean Smith, his wife. This John Morton was second son of James Morton, farmer at Green, near Wishaw, by Janet, his wife, daughter of John Cunningham of Cairneyhead. James Morton of Green was son of John Morton sometime farmer at Whitshaw and afterwards at Green, by his wife, Mary Newlands. (Paterson's Ayrshire Families and Lyon Office Records.) Mr Morton attended law classes in Edinburgh, and became in 1802 a procurator in the Sheriff-Court of Ayrshire. By indomitable perseverance and attention to business, he attained the highest position in his profession. From 1832 he was agent for the Liberal party, until increasing business and advancing years compelled him to retire from politics. He was law agent of the Ayrshire Bank from its commencement in 1830 till it merged in the Western Bank in 1847. His connection with this bank as well as with many monied men and landed proprietors, was the source of a lucrative conveyancing business; and when sasines were taken upon the ground of the lands conveyed, almost every week saw him and his apprentices on an infeftment excursion. His kindness to his "boys" on these occasions is remembered with delight. "He then threw aside the working man and became the friend. His watchword was work while you are at work and play while at play, but never unite both." Mr Morton was a captain in the volunteers of the French war period, and he used to refer to this period with great elation. In early life he was of a hospitable and social disposition, but for more than thirty years he had ceased to go into society, and few friends were entertained in his house. His entailed estate of Belmont descends to his nephew, Mr Mathie. The *Ayrshire Express* pays this tribute to him.

"As a professional man, Mr Morton combined a thorough knowledge of law with an intuitive perception of character. He was not so famous as a lawyer as he was as a guide to his clients, both local and county. Mr Morton was one of those grand old whigs who fought the battle of progress, when to acknowledge such in a provincial town was death to a young man. But like all other whigs of that age, he thought that the Reform of 1832 should be considered final. We cannot conclude our notice of Mr Morton without recommending his character and habits to the special consideration of the now young members of the Ayr bar. A more punctual, diligent, and considerate practitioner we have never met. In point of fact Mr Morton was never known to leave work undone at night which might be done in the morning. He always had a charitable disposition, and professionally did his utmost to bring about an arrangement between two parties before advising them to go to law. He will be much missed for his common sense advices, for

> "His life was work, his language rife
> With rugged maxims hewn from life.

Appointments.—Sir James Ferguson, Bart., M.P. for Ayrshire, has

been appointed Under Secretary of State in place of the Earl of Belmore. The Government appear to have thought better of their intention to appoint a Scotch Under Secretary to perform the functions of the Lord-Advocate. The Hon. A. F. O. Liddell, Q.C., has been appointed permanent Under Secretary for the Home Department, in place of Mr Waddington, resigned. Sir Robert Phillimore, has been appointed judge of the Admiralty Court in succession to Dr Lushington. Sir Robert was called to the Bar in 1841, and has held the office of Queen's Advocate under the present government. Sir Robert Phillimore has long been known as a successful practitioner in the Ecclesiastical and Admiralty Courts, and as the author of a large and useful, but carelessly compiled, and often inaccurate, book, in four volumes, on Public and Private International Law.

Dr Travers Twiss, Q.C., has been appointed Queen's Advocate in room of Sir R. Phillimore. The learned gentleman has long been distinguished by the academical offices he has held, as well as by his learned works on the Law of Nations.

Mr John Bartlemore, writer, Paisley, has been appointed by the Crown Clerk of the Peace for Renfrewshire, in room of Mr Robert Wright, deceased. Mr Bartlemore thus becomes a pluralist, having held since Feb. 1857 the office of Commissary Clerk for the county, the fees of which were returned to Parliament as amounting in 1863 to L.474 2s. 6d.

A CIRCUIT COURT AT GREENOCK.—When we suggested in May last that the Inverary Circuit Court should be transferred to Greenock, we overlooked the fact that the Act of 1864, giving power to alter the circuits of the Court of Justiciary, contains a proviso (introduced, it is said, at the suggestion of the ducal obstructive to whom we referred in our former notice) that "Circuit Courts shall continue to be held at such towns as are appointed in the Acts" 1672 and 20 Geo. II., c. 43. The village of Inverary and its noble owner can therefore be deprived of their prerogative only by an Act of Parliament. The Town Council and the Faculty of Procurators of Greenock resolved some time ago to petition for an order in council making the change which is so obviously expedient, but it was pointed out by that vigilant and accurate lawyer Sheriff Fraser that this course would be unavailing. We are informed that the Faculty has now agreed to memorialize the Home Secretary to sanction the establishment of a Court at Greenock, having for its territory, in the meantime, the shires of Renfrew and Bute and the parish of Largs. The people of Bute and Largs are of course favourable to this plan. Greenock itself will supply more than the average amount of crime tried at a Scotch Circuit. At the next Glasgow Circuit there will probably be brought from Greenock, in addition to other cases, the very serious case of Tasco, the negro sailor, for murder; the brothers Service for fire-raising; and the captain of a steamer for culpable homicide.

SCOTCH APPEALS, 1867.—The following is a list of the Appeals from the Court of Session heard and disposed of by the House of Lords during last session:—

No. of Days Argued.	Name of Case.	From which Division.	Result.
5	Lord Advocate *v.* Hunt,	First.	Reversed.
3	Dickson *v.* Pagan,	Second.	Affirmed.
5	Western Bank *v.* Addie (2 Appeals),	First.	Reversed.
4	Nicol *v.* Paul,	Second.	Affirmed.
2	Lindsey *v.* Oswald,	Second.	Affirmed.
3	Nisbet or Diggens *v.* Gordon,	Second.	Affirmed.
2	Bruce or Mitchell *v.* Pres. of Deer,	Second.	Affirmed.
2	Mackintosh or Dunlop *v.* Johnston,	Second.	Affirmed.
3	Jenkins *v.* Robertson,	First.	Reversed.
4	Forbes *v.* Eden,	Second.	Affirmed.
1	Pringle *v.* Bremner,	First.	Reversed.
4	Lord Advocate *v.* Sinclair,	First.	Affirmed.
10	Campbell *v.* Campbell,	Both.	Affirmed.
2	Western Bank *v.* Baird, Do. *v.* Baird's Trustees,	Second.	Dismissed.
4	O'Reilly or Carleton *v.* Thompson,	First.	Affirmed.
5	Longworth or Yelverton *v.* Yelverton,	First.	Affirmed.
4	Gillespie *v.* Young,	Second.	Affirmed.

This table shews some curious results. There were seven appeals from the First Division, and the judgments were reversed in four. There were nine appeals from the Second Division, in which the judgments were all affirmed, except in *Western Bank* v. *Baird*, in which the merits were not considered, the appeal being dismissed for want of jurisdiction. In the Breadalbane case, the judgment of the whole Court was affirmed.

RETIREMENT OF DR LUSHINGTON FROM THE ADMIRALTY COURT.—The position occupied by this eminent judge has long been so exceptional, and his judgments justly receive so much weight, even in Scotland, that we feel bound to commemorate his services by a longer notice than we can in the ordinary case afford to an English lawyer. The *Standard* says:—"The late Judge of the Court of Admiralty was the son of Sir Stephen Lushington, chairman of the East India Company. Born in 1782, he was sent to Eton, and thence to Oxford, where he took his degree in 1803. He entered as student of the Inner Temple, and was called to the Bar in 1806. He entered Parliament the year after in the Liberal interest, taking a prominent part in the struggles of that exciting time, and steadily rising into note both as a Parliamentary debater and as a forensic orator. When Queen Caroline was on her trial, Mr Lushington was retained, with Brougham and other eminent counsel, to defend her injured and affronted majesty, suffering, with his learned brethren who were associated with him in the defence, the full penalty for having taken the uncourtly side in a trial which has scarcely precedent or parallel. When the Reform debates of 1830-32 came on, he espoused the popular side, and at last was rewarded for his many years of unshaken allegiance to his party by the accession of his friends to power after the Reform Bill had passed, and the strength of the Conservative party was scattered to the winds. He was elected to represent the Tower Hamlets in the first Reformed Parliament, and would probably have continued to represent that borough but for an Act of 1839 disqualifying the Judge of the Court of Admiralty from becoming a member of Parliament. The measure was not aimed directly at him, though unquestionably occasioned by his appointment in the previous year. Until that time, the Admiralty Judge, like the Master of the Rolls, was not disqualified by his judicial appointment. An attempt to pass a disabling statute as to the latter officer was defeated by a brilliant and well-timed speech by Macaulay, who converted the House in spite of itself, and turned the fortune of the day by a few specious sophisms. Possibly an equal measure of success might have attended an equally determined effort for the exemption of the Judge of the Court of Admiralty from the legislative ban. But no such attempt was made, and the result was that, at the dissolution in 1841, Dr Lushington was unable to offer himself for re-election to the House of which he had been for thirty-four years a member.

"The high reputation enjoyed by Dr Lushington during his protracted tenure of office appears to supply a fresh argument in favour of that ostracism from the re-

presentative assembly, by which a great guarantee for public interest is secured at the cost of a severe sacrifice of feeling on the part of a few successful lawyers. It is hardly in the nature of things that an active politician should escape an amount of adverse criticism not altogether consistent with the respect due to those who administer our laws: nor is it entirely impossible that his judicial utterances may sometimes be unconsciously biassed by the heated atmosphere of the political arena. The high reputation of Dr Lushington as a judge is probably due in a great measure to his enforced freedom from these disturbing influences. Certain it is that no one ever succeeded in a greater degree in inspiring suitors with a complete and unwavering confidence in the legal soundness and substantial accuracy of his decisions. At a time when many of those who preside in other courts were but just emerging from obscurity, and before half the Queen's counsel now in full practice had begun their legal studies, he was charged with the administration of a difficult and intricate branch of the law. Predecessors like Lord Stowell had moulded into shape the rules which regulate maritime warfare, and to a great extent also they had drawn the outlines of a system applicable to the mercantile marine of former days. But with the application of steam to ocean navigation, with the construction of clipper ships, and the enormous growth of our carrying trade, fresh questions were continually cropping up, and fresh disputes arose, to which the precedents of former days were inapplicable or inadequate. It will be recognised, as Dr Lushington's strong and indefeasible claim upon his country's gratitude, that he perfected and systematised the law, which a careful consideration of altered circumstances introduced or necessitated. In the very nature of things suits arising out of collisions or salvage services are hotly contested, probably because more than in any class of litigation both sides honestly believe themselves to be right. Yet it is noteworthy, as showing the confidence which Dr Lushington inspired, that his decisions were seldom appealed against, and still more rarely reversed. In two remarkable and recent instances—the collisions between the *Samphire* and the *Fanny Buck*, and between the *Amazon* and the *Osprey*—appeals were presented and argued by the ablest counsel at the bar, but in both the decision of the court below was sustained. And in the yet more noteworthy contention about the Banda and Kirwee booty, where the point was new, the litigants numerous, and the stake immense, the late judge's admirably reasoned judgment carried conviction to the minds even of those whom it disappointed, and made the first, also the final, stage of a great *cause célèbre*.

LIQUIDATORS.—In the evidence before the Commons' Select Committee on Limited Liability, a witness states that there are nearly 260 companies in liquidation, and their aggregate capital is about £90,000,000. He says that nearly one-fourth of these companies are in the hands of one firm, consisting of three partners, each of whom would have on an average twenty companies to liquidate, and could not give more than about twenty minutes a day to each, on an average. Another firm, with four partners, have an average of nine and a half companies each, and could give about three-quarters of an hour a day to each, if they had no other business to attend to; but their other business is very large. The powers of liquidators are very great. Mr Newmarch is inclined to say that at present we live under a constitution of Queen, Lords, Commons, and liquidators. Lord Romilly said to the committee, "Unquestionably these liquidators are making very large fortunes; they admit it frankly." The immense amount of money passing through their hands leads the court to lean rather to the appointment of eminent firms than of less known men. The liquidators are almost uniformly accountants; but Mr Church, one of the chief clerks of the Rolls Court, stated to the committee that merchants, bankers, or managers of joint-stock companies would be as efficient—and indeed more so—but they are unwilling to undertake the charge. The security given is, says Lord Romilly, commonly that of a joint-stock company, and he has had apprehensions that if a great official liquidator failed, the amount of suretyship might be too great for the company to meet.—*Law Times.*

THE LIMITED LIABILITY ACTS.—The Select Committee upon the Limited Liability Acts have reported the following resolutions:—That all companies should hold a general meeting of shareholders within four months of the date of the registration of the company. That companies hereafter to be formed may, by the memorandum of association, and companies already formed may, by special resolution, agree to carry on business on the terms that certain shareholders thereof may be responsible to the extent of the whole of their means, whilst the rest of the members of the company are liable only to the extent of the shares held by them; such companies, nevertheless, to continue to be called "Limited." That companies may, if they

think fit, have a portion of their shares paid up in full, the remainder not being so paid up. That as regards all shares paid up in full, it shall be competent for companies, if they think fit, to issue certificates to bearer, so that the shares may be transferable by delivery. That the seller of shares may claim a registration of the shares into the name of the buyer, upon producing an acceptance of those shares signed by the buyer. That the law concerning the mode of contracting, so as to bind companies by their agents, should be amended by introducing clause 41 of 19 and 20 Vict. c. 47. That the court before which a petition for winding-up shall be brought shall have power to refer the simpler cases of liquidation to such County Court as it may direct under the order of the said court. That a petition to the court to wind-up a company, if presented by shareholders, should be signed by one or more shareholders who are either original allottees of shares, or whose names have been on the register as shareholders for a period of not less than six months. The companies should be allowed to reduce their capital, or to reduce the amount of their shares, or to reduce both their capital and their shares, on the following conditions:—Notice shall be given to the Registrar of Joint Stock Companies. Notice shall be given by advertisement or otherwise in such manner as the Board of Trade may direct; that the consent of all parties, being creditors of the company at the date of the reduction, be obtained; or that the claims of such creditors be discharged; or that in cases of the absence or legal incapacity of creditors, that the amount in cash, of their claims, be invested in Government securities, or placed in the Bank of England in the names of trustees, under conditions to be approved by the Board of Trade. That it is highly desirable that a Bill should be brought in by the Government in the present session, to carry out the alterations proposed.

Some other resolutions were proposed by Mr Watkin, but rejected, viz., that on allotment of shares a printed copy of the memorandum and articles of association, and of any other schedules or documents which bind the company be sent with the letter of allotment; also that all companies be compelled to supply to any shareholder applying for it a list of the names and addresses of the shareholders whose shares are not fully paid up; and further that the companies should send to any member applying for it a shorthand writer's report of the proceedings of every general meeting; but these motions were negatived. The resolution allowing two classes of shareholders, with limited and unlimited liability, was adopted in lieu of a resolution proposed by Mr Watkin to the effect that it should be made clear that companies may adopt the principle of commandite partnership—that is to say, carry on business under the chief control of a manager responsible to the extent of the whole of his means, while the rest of the members of the company are responsible only to the extent of their shares. (Since this was in type an Act has passed this Parliament giving effect to the recommendations of the Committee.)

THE OVEREND AND GURNEY CASE.—The House of Lords, in a very elaborate judgment, has sustained the judgment of Malins, V.C., and so vindicated the righteous principle which they had been supposed to have shaken, that shareholders shall not be permitted to evade their liabilities to creditors because they have been themselves deceived by their own directors. Shareholders are now solemnly declared by the ultimate Court of Appeal to be contributories; their remedy, if any, being against those by whom they were deceived. It would, indeed, have been an iniquity for ever disgraceful to British law if it had been held to be competent for a body of shareholders speculating for profit to pocket the money of innocent depositors, and when called upon to restore it, to say in effect, "Our directors induced us to join them by statements not true and promises not performed, and therefore we refuse to repay to you the cash which they, as our agents, received from you to hold for you until you required its return."—*Law Times.*

*** Our review of Mr Taylor Innes's valuable work on the Law of Creeds in Scotland is unavoidably delayed. We are also compelled, by the pressure of Acts of Parliament on our space, to postpone our Summary of the Legislation of the past year, and in particular our remarks on the Debts Recovery Act. Subscribers will notice that for their convenience this important statute has been issued with the present number, considerably earlier than it would have been in the ordinary course, but without altering the paging of our collection of Scotch statutes.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

SCOTT *v.* NAPIER.—*June* 25.

Property—Loch—Parts and Pertinents—Prescription—Crown Charter.

Question between proprietors of lands adjoining St Mary's Loch and Loch of the Lowes. The other proprietors bordering on the lakes were called but did not appear. Lord Napier claimed exclusive property in the lakes under his titles to Bowerhope and Crosscleuch; and Scott brought this action of declarator that he and the other proprietors on the lakes have a joint right or common property in them, and that Lord Napier has no exclusive right. Lord Napier's titles are deduced from a Crown Charter in 1607 in favour of Robert Scott, of the lands of "Bowerhope *una cum duobus lacubus nuncupatis lie* St Marie Lochis de Lowis," with a reddendo of £20 6s. 8d. for the lands and 20s. for the lakes, which, since 1823, has been paid to the Crown. These lands passed to Sir Robert Scott, whose investitures in 1621 also mentioned the lakes, and were apprised by Patrick Scott, who made an entail under which defr. holds the lands. In the infeftment upon the apprising, and subsequent titles since 1621, the lands are named, with pertinents, but not the lakes. Pursuer argued that the apprising did not carry the lakes, which were a separate subject; and, further, produced a grant by the Crown in 1599 to the Master of Yester of the lands of Rodono among others, *cum lacubus*, which it was maintained could refer to no other lakes than those in question, and made it impossible for the Crown to regrant them to another party in 1607. Exclusive possession was averred by defr.; and denied by pursuer. Proof as to possession was led.

The L. O. (Jerviswoode) found that defr. was vested in the said lands of Bowerhope, together with the said lochs, fishings, and pertinents, under the titles; and had enjoyed the exclusive possession of the lochs; that pursuer was infeft in the lands and barony of Rodono "*cum domibus ædificiis hortis pratis lacubus piscationibus*," &c., abutting upon the shore of the Loch of the Lowes, and to some extent on that of St Mary's Loch; that he and his authors had also, in fact, used the margin of the said lochs, so far as they adjoin his lands, for the purposes of pasture, watering cattle, and the like; but that, in point of law, such uses as the pursuer or his authors had had were of a character which he or they might enjoy as a consequence of their access to the same as proprietors of the lands adjoining the lakes, and not as an assertion or exercise of a right of property over the same. His Lordship therefore assoilzied defr.; holding that the mention of lakes in the

charter 1599, among many other "pertinents," could not amount to more than a sufficient title to warrant, as against the Crown or other granter, possession of lakes within the boundaries; but did not necessarily denude the Crown of the right to lakes which merely adjoin in part the lands conveyed. The Crown not being thus divested of the lakes, it followed that the charter of 1607 was within the right and power of the Crown to grant; and that defr.'s title at least was complete, and exclusive of any alleged title held by pursuer, if he were under the progress founded on. Pursuer had maintained an argument from the omission in the apprising by Patrick Scott of express mention of the lochs. They were certainly not specially apprised, except in so far as they might pass under the general designation of pertinents. The original charter conveyed the lakes along with Bowerhope, and not as separate subject, the phrase "*una cum duobus lacubus*" being words to convey something of a pertinential character rather than a distinct and separate subject. This went far to support the defr.'s case, and on the whole, the defender must prevail on the question of title. Had the state of possession not been in accordance with this view of the title, the L. O. would not say what effect that might have had on his conclusion. But such as they are, the exercise of them appeared to his Lordship to have been wholly with defr., and as in right of property.

Pursuer reclaimed.

Lord CURRIEHILL. The titles of parties were quite conformable with the common law presumption (Stair ii. 373, Bankt. ii. 312, Bell's Pr. 648, 1110) that the lochs belonged jointly to all the riparian proprietors. The use had of the loch had also been in conformity with that presumption. Each of the four, including Lord Napier, had enjoyed such use along with others, but none of them had excluded the others. There had been no instance of exclusion of the others by defr. till 1861, when these proceedings were commenced. The question was not whether such an exclusive right had been lost, but whether it had ever been acquired; and even if all the acts of possession founded on by defr. had been as he represented them, they would not overcome the legal presumption referred to. Defr. founded on a charter of 1607, and the progress of titles showed that the lands of Bowerhope were transmitted to him by the very same description which was in the charter; but in all the subsequent transmissions there was a conspicuous absence of the lakes, and the feu-duty stipulated for them. His Lordship then entered into a minute analysis of the titles, in order to show that the lakes were not conveyed to defr. with the lands. In the charter of 1607, the lakes had been conveyed as an entirely separate tenement, and they had been granted expressly in virtue of the Act of Dissolution 1587, C. 30; being part of the lordship of Ettrick Forest which had been annexed to the Crown by 1455, c. 41. There was no renewal of the investiture in the lochs since 1621, so that the right, even if originally valid and not extinguished by prescription, was still *in hæreditate jacente* of Sir Robert Scott. Defr. had failed to establish his exclusive right; but maintained that if the lochs were still *in hæreditate jacente* of Sir R. Scott, pursuer had no title to sue. It was true that, if the lochs were in that position, pursuer would not have a title to insist in the conclusion that the lochs belong to all the riparian proprietors jointly. But if it were so, on the other hand, defr. was not entitled to interfere; and pursuer would be entitled to interdict against his interference. There was, however, good ground for holding that the

Crown grant was never effectual, having been *ultra vires*. The very fact of their being included in the grant to Rob. Scott shewed no exclusive grant of them had been made before 1607; and there was thus no evidence to exclude the legal presumption that prior to that the lochs had belonged to the riparian proprietors, and that consequently it was *ultra vires* of the Crown to make any such grant. That presumption was corroborated by the fact that the title to the lochs was not kept up, but they were absent from the titles for two centuries. Above all, it did not appear that the charter of 1607 had ever been followed by exclusive possession; so far as memory could go, it was proved that there had been a promiscuous use by all the proprietors, so that all the proprietors having titles with parts and pertinents, the contention of the defender was excluded by the operation of the positive prescription. (Erak. III. 7, 4).

Lord DEAS was for adhering to the judgment of the L. O. It would be absurd to hold that wherever the Crown makes a grant of a stripe of ground with pertinents on the banks of a lake, for example of Loch Lomond, there is at once vested in the grantee a right of joint property in the *solum* of the lake. The object of the grant of 1607 was to attach the lakes as a pertinent to Bowerhope, and the right, which required no possession to validate it, could not be lost by the long negative possession for want of possession, unless gained by another party having a proper title by the positive.

Lord ARDMILLAN concurred with Lord CURRIEHILL.

Adhered to L. O.'s interlocutor.

Act.—Decanus, Young, A. Moncrieff. Agents—Scott, Moncrieff, and Dalgetty, W.S.——Alt.—Advocatus, Mark Napier, Fraser. Agents—Hunter, Blair, and Cowan, W.S.

ASHBURY CARRIAGE Co. *v.* N.B.RY. Co.—*July* 4.

Adjustment of Issues—Report to Inner House.

At the first meeting for adjustment of issues the parties did not agree as to the terms of the issue. Pursuers, being anxious to have the case tried at the next jury sittings, and this being the last day for giving notice, the L.O. (Jerviswoode), on their motion, reported the issues verbally. Defrs. objected on the ground that 13 & 14 Vict. c. 36, s. 38, required a second meeting to be held before the L.O. could report the issues—at least that such had been the universal practice. *Held*, that there was no incompetency. After hearing parties on the course taken and on the proposed issue, the Court was of opinion that it could not be adjusted without further consideration, and pursuer was appointed to lodge his amended issue next week, the case being now in the Inner House, although the L.O. had written no interlocutor reporting it.

Act.—Mackenzie, Shand. Agent—James Webster, S.S.C.——Alt.—Young, Keir. Agent—Stodart Macdonald, S.S.C.

MACLEAY *v.* SINCLAIR—*July* 4.

Teinds—Locality—Relief from Stipend—Warrandice.

Question arising on objections by Macleay of Keiss to the interim scheme

in the locality of Wick. The respt., Sinclair of Freswick, claimed to be relieved by Macleay of the stipends payable for her estate, in virtue of an alleged obligation of relief from stipend contained in a minute of sale of the lands of Nybster by Sinclair of Dunbeath to Sinclair of Freswick, in 1740. By that deed, the seller bound himself to deliver to the purchaser a disposition of the lands of Nybster, with the teinds, "free of all stipends, schoolmaster's fees, and other public burdens and impositions whatsoever," and also of the lands of Keiss, "in real warrandice and security of the said lands of Nybster, teinds, and pertinents thereof." Respts. admit that no conveyance of the warrandice lands was ever executed. Nybster was disponed to the purchaser, and, having been entailed by his son, is now the property of respt., as heiress of entail. The estate of Keiss was acquired from Dunbeath by Sinclair of Ulbster, before 1772; and from the Ulbster family by the objector's uncle, in 1813. The objector is therefore only the singular successor of Dunbeath, who executed as seller the minute of sale in 1740. No constitution of the burden exists in any of the titles of either party. The L.O. (Barcaple) held that respts. had set forth no ground sufficient in law for localling on the objector's lands in respect of the respt.'s lands of Nybster, and remitted to the clerk to correct the interim scheme. His lordship held that there never was any real burden imposed upon the lands of Keiss for the relief of Nybster from stipend; and that the objector was not under any personal obligation as the singular successor of Dunbeath. The respt., however, rested her case on the plea of *res judicata* in previous localities, and a long course of payment and acquiescence. In all the localities since the purchase, beginning with 1772, Keiss had in fact been localled upon for stipend effeiring to Nybster. The respondent stated that in the first locality there was a note signed by the minister, bearing that "the estate of Keiss is liable in the stipend and augmentation for Nybster by bargains 'twixt the late Freswick, who purchased Nybster, and the said Sir William Sinclair" of Dunbeath. This principle of localling appeared to have been then adopted, and to have been unchallenged ever since. But no question was ever raised in regard to it. In these circumstances, the L.O. did not think that the mere unchallenged adoption of this mode of localling in previous localities could constitute *res judicata*, especially as none of the localities were approved of as final.

The long course of payment and acquiescence could not, in any view, be founded upon as against the objector with reference to the period before it was acquired by his ancestor in 1813. In regard to the period since that time, it must be kept in view that this was not a question of prescription, and that it must be shown that the proprietor of Keiss took the obligation upon him in a manner clearly importing that he intended to do so, and in the knowledge that he was under no previous obligation in the matter. But the L.O. thought the inference from the whole facts was, that the parties were all along in error as to the existence of an obligation; and that, in these circumstances, there was nothing to bar the objector from now betaking himself to his legal rights. In this view of the case, it was unnecessary to consider whether the Court would ever sanction such a mode of localling where the question is raised, there being no real warrandice. Dykes *v.* Marshall (Feb. 18, 1834, 12 S. 460) was adverse to such a practice; and if sustained on the ground that the objector, or those whom he represents, had personally adopted the obligation, it would not be effectual

against a singular successor who should now purchase the lands with no notice of such a burden on the records.

The respondents reclaimed; but the Court adhered, reserving, however, to the respondents all rights which they might be able to enforce in any habile action, and to the objector his answers thereto. The respt. should not be precluded from making her claim good, on the ground of objection or otherwise in any competent proceedings. That could not be done in a locality.

Act.—Advocatus, Clark, Nevay. Agents—Horne, Horne, & Lyall, W.S.——Alt.—Sol.-Gen., Adam. Agent—A. J. Napier, W.S.

MORRIS *v.* RIDDECK—*July* 16.

Donatio Mortis Causa—Legacy—Proof Parole.

Action by executors of Morris, who died on 5th Nov. 1864, without issue and intestate, leaving considerable heritable and moveable property. Pursuers alleged that, shortly before his death, and while ill of the disease of which he died, the defr. had had handed to him by decd., or had obtained possession of and now retained, a deposit receipt for L.300, blank endorsed by Morris, and another paper which bore to be an order for payment of the sum in the deposit-receipt; and that defr. got the money, which he did not pay to decd. The conclusion was that that money should be found to form part of the executry. Defr. answered that the deposit-receipt was given to him by Morris in his (defr.'s) house, where Morris had lived for many years, but which he was then leaving; that Morris took it from a chest, indorsed it, and gave it to defr., to whom he also gave the order; that this delivery was made on the footing that, if Morris recovered the money was to be returned; if not, it was to be the property of the defender: that defr. drew the money, and wishing to make perfectly sure that he understood the intention of decd., paid it over to him; that same day Morris sent for him, and handed to him the money as a gift; and that he received it on the footing that it was to be returned if deceased recovered, otherwise to be defr.'s own. The L.O. (Jerviswoode), after proof, sustained the defences. Pursuer reclaimed.

Lord PRESIDENT—Parties were almost agreed that the facts alleged by defr. had been proved by parole evidence. The result of the evidence of defr., the chief witness (corroborated by others, and by facts and circumstances), was, that decd. had handed over the money on condition that so long as he (Morris) should be in life defr. should hold it for him, and in the event of his dying, should use it for his own purposes—*i.e.*, that it should become his property absolutely. It was represented, however, that in practical effect this was a legacy, though in form it might be more correctly described as a *donatio mortis causa*. Pursuer argued that, whether it was the one or the other, it could only be constituted by writing, and that this attempt to set it up by proof *prout de jure* was incompetent. A *donatio mortis causa* is not in the law of Scotland in all respects the same as in Roman law. It answers, indeed, to the definition in the Inst. (de donat., ii. 7.1), to the extent that it is a gift made in contemplation of death, and that the motive and intent of the giver in both systems are the same—viz., that he prefers the grantee to his heir, but himself to both. In Roman law there were three kinds of donation *mortis causa;* but we have received

only one, not answering precisely to any of the three. It may be defined in the law of Scotland a conveyance of immoveables or of an incorporeal right, or a transference of moveables or money by delivery, so as to transfer the right of property to the grantee on the condition the grantee shall hold for the donor during his survivance, and subject to his power of revocation. It is involved in this, that, if the grantee predecease, the property reverts to the granter, and the qualified right of property is extinguished. The question immediately before us is, whether writing is essential to the constitution of such a donation *mortis causa*, as it is to the constitution of a legacy above L.100 Scots. No doubt, the definition of a *mortis causa donatio* savours much of the nature of a legacy, but the distinction is, that in the former there is an immediate though qualified transference of property. It appears to me that, whatever is sufficient to prove such transference in the ordinary case, must be sufficient also where there is a condition attached, as in the present case. Property in moveables is transferred by bare tradition, and I cannot resist the conclusion that, if the absolute right is so transferred, it is unjust, and contrary to all the principles and analogies of the law, to hold a gratuitous transference ineffectual without writing because the recipient acknowledges that the gift was made subject to a condition. In short, I cannot find any such distinction between a gift and a *donatio mortis causa*, that writing is essential to the one and not to the other. This is not a question as to the mode of proof. If writing be essential to the constitution of a *donatio mortis causa* as much as of a legacy, it is incompetent to prove it by the admission of the executor or his writ or oath, and equally so if the executor referred to the oath of the donee. The true question is whether the rule as to legacies applies to donations *mortis causa*. In Mitchell *v.* Wright, Nov. 17, 1759; Mor. 8082, the ground of judgment was that the gift there was made *de præsenti*, though its effect was suspended till the donor's death, and that the rule as to writ being essential to legacies did not apply in respect of the delivery of the money.

The other judges concurred. Lord Deas said the difficulty was to see what was the nature of a donation *mortis causa* as distinguished on the one hand from an irrevocable gift, and on the other from a legacy. 1. A *donatio mortis causa* must be made with a view to death; 2. It must take effect only if death result from that particular illness; 3. The money or other subject of the donation must be delivered (though this was not required by the Roman law), delivery taking the place of writing. On the one hand it differs from an absolute gift in that (1) it is ambulatory and revocable; (2) it remains liable to the granter's debts in case of a deficiency of funds; (3) it is affected by *jus relictæ* and other such rights; and (4) it is subject to succession-duty. On the other hand it differs from a legacy in that (1) it does not require writing; (2) it is preferable to legacies. The authorities made this tolerably clear—Bankton, I., 9, 16, 18; Erskine, III., 3, 91; Stair, III., 8, 39; III., 4, 24; Mitchell *v.* Wright, *supra*; and Baron Hume's Lectures.

Adhered to the L.O.'s interlocutor, assoilzieing the defr.

Act.—Gifford, Strachan. Agents—Crawford & Guthrie, S.S.C.—— Alt.—Scott, Burnet. Agent—A. K. Morison, S.S.C.

NEWTON *v.* NEWTON.—*July* 16.

Entail—Deathbed—Aberdeen Act—Rutherfurd Act.

The pursuer succeeded as heir of entail to the estate of Newton on the death of his father. That gentleman on deathbed granted two deeds of provision in favour of his wife and younger children, under powers in the deeds of entail. One of them was a liferent by locality over certain portions of the entailed estates; the other a bond of provision to the younger children. It was not disputed that the granter was on deathbed, or that the provision would have been valid if executed in *liege poustie*. The deceased had previously granted in favour of his wife a bond for a liferent annuity of L.500, under Lord Aberdeen's Act. The pursuer brought actions of reduction of the three deeds. The original entail of 1724 excepted from the irritant clauses full powers to heirs of entail to grant liferent infeftments of locality to wives and husbands "in lieu of their terce and courtesy, from which they are hereby excluded," and also to provide younger children to three years free rent. *Held*, in conformity with *Reid* v. *Hoselaw*, 24 Nov. 1794, M. 15,869, that the exclusion of terce being a condition of the gift by the entailer, each succeeding heir took subject thereto, and his sasine, which was the very foundation of the widow's claim to terce by its terms excluded her right; that, on the other hand, the power to provide for widows by locality, though reserved in the entail, was entirely optional to the heir in possession, and was an element of his ownership of the estate; that the deed of locality and bond of provision in question were not granted merely in the exercise of a faculty, but in the exercise of the right of ownership, and were not protected from the operation of the law of death-bed. *Held*, also, that the deed of locality was not valid as coming in place of a legal provision of terce, the widow never having had such a right of terce; and that the bond of liferent annuity for L.500, although it would have been effectual if the granter had continued to hold the estate exclusively under the title upon which it was possessed by him at the date of the bond, was yet a revocable deed, and had been rendered inoperative by a new entail subsequently made by the deceased under § 4 of the Act of 1848, in which he declared that he and his heirs should enjoy the estates under *that tailzie only* (though the conditions of the tailzie of 1724 were imported into it, and it was executed under an arrangement with the heirs in that tailzie), and which brought into play the provision of the 12th sec. of the Aberdeen Act of 1848, enacting that the Act shall not be applicable to any entail dated on or after 1st Aug. 1848; as well as by the intention of the testator, as declared in the deceased's affidavit made to the Court with regard to burdens affecting the entailed estates, and by his granting the other provision to the defender by way of locality.

Act.—Fraser, Gifford. Agent—James Dalgleish, W.S.——Alt.—Shand. Agents—Hunter Blair & Cowan, W.S.

GREIG *v.* SIMPSON AND MILES—*July* 19.

Poor—Settlement—Seaman—Continuous Residence.

Action by the City Parish of Edinburgh against the parishes of South Leith and North Leith; and the question was, in which of the two latter parishes a pauper, Messer, a sailor, had his settlement. For 13 years prior to

1858, he resided continuously in South Leith. At Whits. 1858 he became tenant of a house in N. Leith, which he and his wife occupied till Whits. 1863. During this period the wife lived continuously in the house; but Messer was away on several long foreign voyages, which, as North Leith contended, interrupted the continuity of his residence. The L.O. (Kinloch) held he had had a continuous residence, in the sense of the statute, in North Leith for five years. Written cases were ordered and sent to the whole Court. The consulted judges, except Lord Benholme, concurred with the L.O.

Lord CURRIEHILL said the case turned on the meaning of the words "continuous residence" in sec. 76 of the Poor-law Act. He would not give any exact definition. The leading features of the case might be comprised in the following propositions:—(1.) Messer was a householder in North Leith for five years before Whits. 1863, being lessee of a house of which he paid the rent and taxes. (2.) During all that time he maintained his wife there, the half of his wages being drawn and expended by her. (3.) He resided there himself at the beginning of the lease in 1858, and he also did so for a considerable period several times subsequently, as well as for a considerable time before 1863. (4.) During his absences, he was serving as a seaman in the merchant service in the regular prosecution of his calling, sailing on foreign voyages. At the end of his voyages, except on one occasion, he returned regularly to his house in North Leith. (5.) He never had during the period in question, any other home or residence than this. He was of opinion that the effect of this combination of circumstances was to constitute continuous residence in the sense of the Act. Unless such a combination of circumstances were sufficient, it would be impossible for any man engaged in a seafaring life ever to acquire a settlement by residence. The same considerations applied to the provision as to the loss of a settlement by absence for a year. There was no difficulty in giving the same meaning to the words "continuous residence" in that clause also.

Lord DEAS concurred—holding that it was possible for a sailor to follow his usual profession and yet to acquire a residential settlement under the Poor-law Act; and that if any sailor could do so this man had.

Lord ARDMILLAN concurred.

The LORD PRESIDENT concurred with Lord Benholme. The words of sec. 76 were not open to construction in the way in which the majority construed them. There must be *personal* residence by the pauper himself, and not merely by his wife. The word "continuous" was open to construction, for the ordinary character of men's life and business prevented their residence in any one place from being absolutely continuous, without any break or interruption; and, accordingly, that word had received a reasonable construction. In this case, however, the pauper had not resided during the half of the period. This was an entirely new construction, turning on the words "residence" and "residing," and not on the word "continuous." He was not moved by the consideration that, according to this view, it would not be possible for seafaring men to acquire a settlement. Paupers had no interest in the question whether one parish or another was bound to relieve them. He differed (1) because the decision of the Court involved a forced and unusual construction of words employed in the Act in the ordinary and natural sense; (2.) because he could not adopt

that construction without contradicting the words of his own judgments in previous cases [see Aberdeen Infirmary *v.* Watt, Dec. 15, 1858, 21 D. 117; Kelton *v.* Tongland, July 6, 1866, 4 Macph. 1033], in which he understood at the time several of his brethren concurred, who now were in the majority.

Judgment against North Leith.

For the City Parish—Watson. Agents—G. & H. Cairns, S.S.C.
For North Leith—Decanus, Scott. Agent—A. Duncan, S.S.C.
For South Leith—Monro, Trayner. Agent—P. S. Beveridge, S.S.C.

HAMILTON *v.* TURNER AND MONKLAND IRON CO.—*July* 19.

Landlord and Tenant—Mineral Lease—Superior and Vassal—Reparation.

Pursuer holds a feu under defr., Turner, by which the superior reserved the minerals, he paying to the disponees "all damages the subjects belonging to them may sustain in and through my working and taking away the same," and it being declared that should said minerals be let, disponees should "have recourse against the lessee thereof for all damages which might be occasioned by the working thereof and not against" the superior, further than that he should be bound to oblige his tenants to settle said damages with the disponees in manner above mentioned. The Monkland Co. and their trustees are tenants of the minerals under pursuer's subjects under a lease granted in 1854, two years earlier than Turner's feu. This lease stipulated that the lessees shall "annually satisfy and pay all damages done by their operations, whether above or below ground;" and the tenants bind themselves to free and relieve the superior of all claims and demands whatsoever which might be made against him by the tenants of said lands arising in any way out of the operations of the lessees, in working, raising, storing, carrying away, or disposing of the minerals. Pursuer averred that the minerals had been improperly and wrongfully dug out and removed without proper and sufficient support being left for the surface-ground and house and buildings thereon, whereby his subjects had sunk and given way, &c., and the whole structure was totally and permanently injured; and he convened both the superior and mineral tenants in an action of damages. The L. O. (Kinloch) sustained the relevancy only as against the mineral lessees, and dismissed it as against Turner. The Court recalled, and allowed a proof before answer, upon advising which, the L. O. adhered to his former decision. The lessees reclaimed.

LORD PRESIDENT could not agree with the L. O. as regarded Turner. It was clear, that Turner was liable entirely *ex contractu*. Pursuer's first plea was that Turner, as the successor of Dennistoun, the granter of his feu right, was bound under it to pay the damages occasioned by the working of the minerals, he having acknowledged and adopted the lease to the other defenders, &c. The grounds of liability raised by that plea were (1) that the superior was under an obligation to pay all damages occasioned to the pursuer by the mineral workings; (2) that that obligation was transmitted against singular successors in the superiority; (3) that Turner had further adopted the mineral lease. This last element of liability was unnecessary. The estate was in a mining district, and the purpose of the feu was for the erection of houses for miners. It was in the knowledge of both parties that the minerals were let to the Monkland Co., and that the

lease authorised them to work under the feu. By the terms of the feu contract, Turner, the superior, was liable *ex contractu*. The tenants, however, were not a party to that contract. They could be liable only *ex delicto*. The real character of the right a lessee takes was even more apparent under a mineral than an agricultural lease. It was a real right under the Act 1449. But what was the obligation of a mineral tenant with regard to the surface? One point was clear, the owner of minerals is bound to work them so as to do as little damage as possible to the surface. Dunlop *v.* Corbet, June 20, 1809. The maxim applied, "Sic utere tuo ut alienum non laedas." The mineral tenant must use all precautions not to bring down the surface, and the owner of the surface might feu it for building even after granting a mineral lease. He could not, however, do this to an unreasonable extent, as by feuing for a factory, but only for buildings of an ordinary description. On applying these principles to the proof the Monkland Co. did not appear to have used due care to prevent injury to the houses on the surface. They, too, were therefore liable, but as the liability of the one def. arose *ex contractu*, and that of the other *ex delicto*, it was not joint, but several liability.

Lord CURRIEHILL concurred as to the superior's liability under the feu contract. He thought the present pursuer had no title to found upon the mineral lease, and consequently had no claim *ex contractu* against the lessees. His claim to reparation *ex delicto* depended on matter of fact. There was no evidence that the lessees had worked the minerals illegally.

Lord DEAS agreed that the superior was liable, and also that the mineral tenants were liable. He was not prepared to say that the obligation was entirely *ex contractu* in the one case, and *ex delicto* in the other. The superior was art and part in the delict of the tenants, the lease being for his benefit.

Lord ARDMILLAN concurred with the Lord President.

The defrs. were found liable severally in damages.

Act.—Pattison, Strachan. Agent—James Paris, S.S.C.——Alt.—Decanus, Gifford, Clark, Watson. Agents—Maconochie, and Hare, W.S., and Davidson and Syme, W.S.

M.P.—ROGERS' TRUSTEES *v.* ROGERS, &c.—*July* 19.

Trust—Liferent of Stocked Farm—Accounting.

John Rogers died in 1844, leaving a widow and three children. His widow died in 1862. Rogers conveyed all his property, including his estate of Northfield, to trustees, and gave a liferent of the whole to his widow. On her death the estate was to be divided equally between the children. The residue of Mr Rogers' estate is the subject of the present competition, and the questions which have arisen between Mrs Scott, the trustee's daughter, as executrix of Mrs Rogers, and the two sons of the truster, the real raisers, relate to the effect of Mrs Rogers' possession during viduity. The truster's estate consisted chiefly of a property in his own occupation, and the settlement provided that the trustees, after paying debts, &c., should place the whole furniture and household plenishing at the absolute disposal of his widow. The third trust purpose was:—"I appoint my trustees to allow the said E. Dykes, so long as she remains my widow, the liferent of the whole free residue of my estate, heritable and

moveable, declaring that she shall be entitled to actual possession, if she so wish it, of the subject and effects to be liferented by her so long as the same are not required to be otherwise disposed of in fulfilment of the purposes of the trust." The nature of the question appears from the judgment of the Court which was delivered by the Lord President. After stating the terms of the settlement, his Lordship said no question would have arisen if the estate had been converted into money. It consisted chiefly of a stocked farm. Taking the whole terms of the settlement together, the intention plainly was that the widow if she wished should have the personal occupation of the estate just as the truster left it. She did so elect. The question was, on what footing was her executor to account for the farm-stocking. The case could not be dealt with as if the widow were entitled to the personal occupation of the farm without stocking; and it was equally inconsistent with the intention of the testator to regard her as a life-rentrix of moveables. The principles relating to a liferent of moveables were not applicable to this, because a *stocked farm* was what she had, a heritable subject and its accessories; which was, somewhat as in a liferent of a mill, a mixed subject? She was not entitled to leave it to the fiar displenished, but was bound to keep up the stock as she received it, as a properly stocked farm. Horses, cows, implements did not perish entirely to the fiar. So as to crop. There was always a certain proportion of the farm in crop, nearly the same proportion at beginning and end of lease or liferent; and it should not be enquired too nicely whether it was larger at the end or the beginning. It was somewhat different as regards crop in the stackyard, barn, or granary. So far as that was on its way to market it was not part of the stock, but it was so, so far as it was necessary for the maintenance of the cattle on the farm. The general result was that we must not weigh in too nice scales the difference between the stock of 1843 and 1862; and unless there was a very palpable deficiency, we are not to be put to weigh one against the other at all. But if it was much better stock in 1862 than in 1843, the executor was fairly entitled to the balance.

Act.—Gifford. Agents—Crawford and Guthrie, S.S.C.——Alt.—Gebbie. Agents—Macgregor and Barclay, S.S.C.

SECOND DIVISION.

ELLIOT, &c. *v.* HUNTER, &c.—*July* 12.

Parish—Manse—Additions.

Suspension and interdict by the heritors of Kirkton against a decree of the Presbytery ordering additions and improvements to the manse, which was built in 1840, and occupied without objection by the last incumbent till 1857, but was never declared "a free manse." The heritors offered to execute the repairs asked for, but declined to do more.

LORD JUSTICE-CLERK—The accommodation of this manse was smaller than the minister might be entitled to if a new manse were now erected; but that did not settle the legal rights of parties. The obligations of heritors were regulated by 1663, c. 21. Nothing in that act made it necessary

for heritors to have a finding by the Presbytery that the accommodation was sufficient, or expressly making the manse a free manse. The heritors were not bound to make continuous additions to meet the views of the Presbytery in a case where the manse had been occupied without objection for more than twenty-five years. The only other question was whether, when a manse required some repairs, but had no structural defect, and was not in a condition of substantial disrepair, the heritors could be called upon to add to its accommodation. He was of opinion that they could not.

The other Judges concurred.

Act.—Clark, Marshall. Agents—Macmochie & Hare, W.S.——Alt. —Cook, Spens. Agent—D. J. Macbrair, S.S.C.

APPEAL—MORITZ UNGER.—*July* 16.

Bankruptcy—Examination— Adjournment—Commission.

In the sequestration of Unger the bankrupt was first examined March 12. The examination was adjourned to March 18, and again till April 2, when the bankrupt was examined at great length. He repeated his statement as to the pocket-book; and the examination was adjourned till July 1, for inquiry. Upon 1st July, at the close of a further examination, counsel for creditors moved for further adjournment, and offering to guarantee the estate against any further expense thereby incurred, obtained an adjournment "in respect of the guarantee above set forth," till Oct. 2, and a commission to examine witnesses and recover documents at London and Hamburg with reference to the matters contained in the bankrupt's previous examination. *Held*, on appeal by the bankrupt, that the adjournment for so long a period was incompetent, and also that the proposed commission was an unheard of and incompetent proceeding. Sec. 90 of the statute gave powers to the *trustee* to obtain information, but did not contemplate that its machinery should be set in motion by individual creditors, and certainly it did not contemplate a roving commission to take the evidence of parties not named, and not in any way described or defined.

PAUL *v.* HENDERSON—*July* 19.

Suspension—Competency—Consignation.

In an Action by Henderson against A. Paul, now in America, and T. Paul, co-obligant with A. Paul, decree was obtained for L.212. T. Paul consigned and offered to pay on an assignation to a third party, and reserving right of appeal. Henderson refused the conditional tender, but intimated that he would give notice before extracting the decree. Paul suspended, to which Henderson objects as incompetent, decree not being extracted; and also on the merits, because he was not bound to grant the assignation. He also consigned the money in the suspension, and in respect thereof asked to get up the money which had been consigned in the action in which the decree had been obtained. The L.O. on the Bills refused the suspension as premature and unnecessary. The L.O. in the action (Ormidale) refused the motion to get up the consigned money.

The Court adhered to L. Ormidale's interlocutor; and altered L. Mure's, and passed the note on caution to try the question.

LORD JUSTICE-CLERK—Paul is decerned against in a decree in which he

was conjoined with another party. He had consigned the amount, and says that tender was wrongly refused. Suspension was not incompetent (Stair, 1, 18, 4). Consignation was equivalent to payment, and had payment been actually made, suspension would have been competent if the debt was not at once surrendered. There was no rule that decree must be extracted. Titles to land were tried in this way. No opinion on the merits whether Henderson was bound to accept the offer and grant an assignation.

The other judges concurred.

Act.—Pattison, Macdonald. Agent—Party.——Alt.—Clark, Paterson. Agents—J. & A. Peddie.

SIMPSON *v.* JOHNSTON—*July* 19.

Road—Contractor—Possession—Judicature Act, § 42.

Application by Road Trustees of Dumfriesshire under 6 Geo. IV. c. 120, s. 42, to obtain interim possession of a bridge which respt. contracted to erect over the Annan. The bridge was commenced in March 1865, was to be completed by August 1866. The trustees alleged that the works were unsatisfactory, owing to the contractor's negligence and incapacity; and that the portion erected would have to be taken down. The contractor alleged, as a reason for delay, that extra work was required by the trustees. The engineer certified to the bad quality of the work; and the arbiter in terms of the contract authorised the trustees to take the works out of respt.'s hands. The contractor raised two actions of reduction of the decree-arbitral and certificates of the engineers, maintaining his right to keep possession of the works, and carry them on to completion during the dependence of these actions. The L.O. (Jerviswoode) granted the order craved. On reclaiming note the Court remitted to Mr Leslie, C.E., who reported that the works in their unfinished state might be endangered by floods, and that there was great urgency for the bridge being completed. The Court adhered, allowing the trustees to take the works from the contractor and complete them by tools and materials belonging to him; finding caution for any damages which may result to him in the event of his succeeding in the reductions

Act.—Fraser, Stewart. Agent—James Steuart, W.S.——Alt.—Gifford, Black. Agent—David Curror, S.S.C.

HOUSE OF LORDS.

LORD ADVOCATE *v.* SINCLAIR.—*June* 7.

(In the Court of Session, June 15, 1865, 3 Macph. 981.)

Salmon Fishing—Prescription—Crown.

Declarator that the salmon fishings in Scrabster Bay belonged to the Crown, and that defr., Sinclair of Forss, had no express grant of such fishings, and had no right to fish for salmon *ex adverso* of his lands of Holburnhead, or in any part of the said Bay of Scrabster. For narrative of the case see report in the Court of Session. The L. O. (Mackenzie) decided in favour

of the Crown. The First Division reversed, L. Deas diss. The pursuer appealed.

Lord Chancellor (CHELMSFORD)—In a case of this kind it was clearly settled that the *onus* of proving a title to salmon fishings was upon defr., because salmon fishings were presumed to belong to the Crown, unless a grant from the Crown could be produced. Defr. had proved possession of the fishings as far back as living memory extended, but that was not sufficient unless also he could produce a Crown charter preceding his entry upon the possession and sasine thereupon. It had been argued that there was no authority that the Crown could be divested of its right to these fishings by possession for forty years, but 1617 c. 12 expressly mentioned the Crown, and therefore rights against the Crown might be argued in this way as well as against the subject. It was also settled that the Crown grant need not contain an express grant of salmon fishings *eo nomine*, but it was enough if it mentioned fishings, if salmon fishings should be possessed for forty years thereunder. Many early charters had been produced to show that the Crown had at an early period parted with these salmon fishings, but there was no clear connection between the early titles and the title of the present respondent. The first title on which respt. could rely was the deed of 1700, which in the dispositive clause mentioned "fishings," and there had been forty years' possession subsequently. That deed would be a good title unless subsequently displaced. It was said that the subsequent charter of 1761 omitted the word "fishings" in the dispositive clause, though the word was found in the tenendas clause, but that charter proceeded on a resignation *in favorem*, and the presumption was that the Crown re-granted all that it received, and amongst other things the salmon fishings. If it did not regrant the salmon fishings respt. was entitled to fall back on his prior title and possession. Moreover, any ambiguity in old deeds was always explained by the possession that had subsequently followed.

Lords CRANWORTH and COLONSAY concurred.

Affirmed with costs.

GILLESPIE *v.* YOUNG.—*July* 11.

Reparation—Patent—Consequential Damage—Relevancy.

Action for damages for false and fraudulent representations by respt., with reference to the mineral known as "the Torbanehill mineral," which he averred to be embraced in a patent obtained by him for manufacturing paraffine oil from bituminous coal, whereby the value of the mineral property of appts. was depreciated. The L. O. (Barcaple) held that no relevant ground of action was set forth, and dismissed the action. The pursuers reclaimed and the Second Division adhered. The pursuers appealed.

Lord CRANWORTH said this was an action brought by the owner of the Torbanehill estate, which contained a mineral of great value as yielding paraffine oil. Appt. had granted a lease of the minerals or some of the minerals in the estate to a tenant, and for many years litigation had gone on as to whether this mineral was included in the lease. The parties had at last the good sense to come to an arrangement by which the tenant agreed to pay a royalty on this mineral, which, to avoid committing either

party, was called between them "the disputed mineral." Now, respt. in this appeal had a patent for extracting paraffine oil from bituminous ous coal, and the contention arose whether these patentees had the exclusive right to extract oil from the Torbanehill mineral, or not. Appts. allege that respts. had falsely, fraudulently, and maliciously represented that their patent gave the exclusive privilege of manufacturing paraffine oil from the Torbanehill mineral, and had threatened to institute legal proceedings against the parties who were in course of exercising their lawful right of manufacturing paraffine oil from such mineral, upon the pretext that such manufacture was an infringement of their patent, &c.; that respts. knew these representations to be false, &c. The question was, whether this allegation set out a complaint which a court of law could entertain. Now he (L. Cranworth) was far from disputing that all courts should scrupulously insist on the truth being strictly adhered to in allegations, not only as regards individuals but as regards the public, and, if it had been alleged that respt., well knowing that his patent did not include this mineral, represented that it did, and so prevented persons from purchasing it, he would have been reluctant to hold that his misrepresentation, coupled with injury to appts., would not give a cause of action. But that was not the ground of action alleged. All the allegations together amounted to no more than this, that respts. said they believed the Torbanehill mineral to be within their patent. That was, however, not, strictly speaking, a fact in the ordinary sense, and there was no distinct allegation that respt. did state it as a fact, but all he said was, "If you don't pay me the royalty I will institute legal proceedings against you to have it declared that my patent includes the Torbanehill mineral." What happened was that some people, rather than enter into litigation about so uncertain a matter, chose to pay the licence duty. But the allegation of knowledge of the falsehood of the representation was far too vague, especially when it was considered that the whole matter was one of scientific opinion, and not a fact in the ordinary sense, which was susceptible of precise and definite knowledge one way or the other.

Lord COLONSAY—The record was deficient in several essential elements. It should have stated in what respect the defr's. allegation was false, and when, where, and in what terms the alleged misrepresentations were made. Both parties had referred to the litigation as to the scientific classification of this Torbanehill mineral. The trial had occupied several days, and men of science had been equally divided as to whether it was coal or not (Feb. 18, 1854, 17 D. 1; Feb. 28, 1856, 18 D. 677; June 20, 1857, 19 D. 897, aff. 3 Macq. 757). Therefore, when the pursuer talked of falsehood, a very peculiar falsehood must be meant. It was obviously not a falsifying of any definite patent fact, but at the most a representation of a matter of scientific opinion. It was nowhere stated distinctly that respt. knew this mineral was not coal. That ought to have been very distinctly stated, and not left to be inferred from doubtful expressions in the record. So also to entitle him to damages the party ought to allege particularly the occasions on which the patent was made use of as a means of preventing the mineral from being sold.

Affirmed with costs.

Act.—Att.-Gen. Asher.——Alt.—Sir R. Palmer, Q.C., Decanus, Grove, Q.C.

CAMPBELL *v.* CAMPBELL (BREADALBANE).—*July* 16.

(In the Court of Session, June 26, 1866, 4 Macph. 867.)

Husband and wife—Habit and Repute—Legitimacy—Proof—Onus—Adultery—1600 *c.* 20.

The facts of the case and the circumstances in which the litigation arose will be seen in the report in the Court of Session. The L. O. (Barcaple) found in favour of Mr Campbell of Glenfalloch, the respondent in the advocation of the conjoined petitions for service. The advocator, Lieut. Campbell of Boreland, reclaimed, when cases were laid before the whole Court. A majority of nine judges agreed with the Lord Ordinary, two, Lords Curriehill and Ardmillan, dissented, and Lord Kinloch declined. The advocator (Boreland) appealed.

LORD CHANCELLOR (Chelmsford) said, *inter alia*—It is not contended that the part taken by appt's. father in the service of respt's. father as heir to Glenfalloch precludes appt. from disputing respt's. claim founded on the same title; but it must be admitted to be a very strong recognition of the legitimacy of respt's. father. Under these circumstances, every presumption is in favour of respt's. title, and appt. must overcome that presumption by proving facts utterly inconsistent and irreconcilable with it. After referring to Eliza Blanchard's letter to the War Office in 1807 as not altogether trustworthy, even if it were admissible evidence, and examining the cases of Cunningham *v.* Cunningham, 2 Dow 510, and Lapsley *v.* Grierson, 8 D. 34, he showed that no habit and repute could have begun before the death of C. Ludlow, as the parties were not then living in the neighbourhood of James Campbell's family and acquaintances, and as the Ludlows must have known that they could not be lawfully married during the lifetime of C. Ludlow. Habit and repute, therefore, could not have had any origin at all in the sense in which it induces a presumption of marriage until after the death of Ludlow, in Jan. 1784. A question was made whether Campbell and E. Blanchard were ever aware of the death of Ludlow; but I think we are bound to presume that they had received information of a fact so important to be known by them. From this time the nature of the relation was entirely changed. If this case was confined to the period between 1793 and 1806, these would be amply sufficient to establish a marriage by habit and repute, and it is not competent to go back to an anterior period, when an illicit intercourse existed, in order to show that the matrimonial relation must have been simulated. The argument on the part of appt. goes the length of contending that if cohabitation commences in illicit intercourse a marriage can never afterwards be established by habit and repute; but as I read the case of Cunningham, if the habit and repute had been uniform and general, although the connection in its origin was notoriously illicit, this House would have decided the case differently.

LORD CRANWORTH, after stating the position of the case, and that one important question was whether from 1793 to 1806 James Campbell passed for and was supposed to be a married man, said—In the attempt to investigate matters of this sort after the lapse of from sixty to seventy-five years, when all contemporary testimony is lost, we must be on our guard against mistaking the spirit in which such inquiries ought to be conducted.

If we find a state of circumstances—the enjoyment of property, for instance —in a particular channel of descent, and we then proceed to inquire, for a collateral object, into the circumstances which have been connected with that enjoyment, in order to discover whether the proper course of descent was followed, we are not to look to the fragments of evidence which may have escaped the ravages of time, in order to see whether they are sufficient to explain and justify the course of enjoyment which has existed. We are entitled to assume *prima facie* that what has been long enjoyed has been rightfully enjoyed; and in investigating collateral circumstances which happened long ago, our inquiry ought rather to be whether they show the enjoyment to have been had in error, than whether they prove it to have been right. After referring to the evidence in detail, and to the contention of appt., he said, that the connection was adulterous in its origin seems to be satisfactorily made out; and the only question is whether there are circumstances to lead us to concur with the Court below that a lawful marriage ought to be presumed to have taken place after it became possible by the death of C. Ludlow in 1784. Marriage can only be contracted in Scotland by the mutual agreement of both parties to become husband and wife. There is, however, no particular form or ceremony by which such agreement must be manifested, except, indeed, that the parties must, in order to constitute a marriage *de presenti*, be in presence of each other when the agreement is entered into, and it must be an agreement to become man and wife immediately from the time when the mutual consent is given. I do not understand the law as even requiring the presence of a witness as essential to the validity of a marriage, though without a witness it may be difficult to establish it. The great facility which the law of Scotland affords for contracting marriage has given rise to rules and principles which had been sometimes considered peculiar to that law. By the law of England and all other Christian countries, where a man and woman had long lived together as man and wife, and had been so treated by their friends and neighbours, there is a *prima facie* presumption that they really are and have been what they profess to be. So it is in Scotland; but as marriage there is not necessarily celebrated in public or recorded, it is much more probable than it would be in England that there may have been a marriage, but that there may be no means of giving direct proof of it. Those who have to decide after the death of parents on the legitimacy of children must, much oftener than in England, rely solely on the *prima facie* evidence afforded by the conduct of the parties towards one another, and of their friends and neighbours towards them. This sort of evidence is spoken of in Scotland as habit and repute. I agree, however, with the argument of appt., speaking with deference to those who think otherwise, that this is an accurate mode of expression. Marriage can only exist as the result of mutual agreement. The conduct of the parties, and of their friends and neighbours – in other words, habit and repute—may afford strong, and in Scotland (attending to the laws of marriage there existing) unanswerable evidence, that at some unascertained time a mutual agreement to marry was entered into. I cannot, however, think it correct to say that habit and repute make the marriage—repute can obviously have no such effect. It is, perhaps, less inaccurate to speak of habit creating marriage, if by habit we understand the daily acts of persons living together, which imply that they consider each other as man and wife, and may be taken to imply an agreement to be what they represent

themselves to be. It seems, however even here, to be improper to say that it makes marriage. The distinction is one rather of words than of substance, but I prefer to say that habit and repute affords by the law of all countries, evidence of marriage always strong, and in Scotland, unless met by counter evidence, generally conclusive. In this case, the evidence of habit and repute would have established conclusively the title of resp., if there had been no evidence of anything prior to 1793. This question is as to the adulterous origin of the connection. I cannot treat this as a mere question of law at all. In such a question it is necessary to look at all the circumstances, and consider whether they do or do not lead to the conclusion that the parties did contract marriage at some time after it was possible for them to marry. Now, here, as C. Ludlow died in Jan. 1734, there was nothing to prevent Campbell from contracting marriage with his widow after that date. I cannot say that the circumstance that they passed themselves off as man and wife when they were not so leads me to think there was even an improbability that they would marry when it was possible they could contract that relation with each other. He had the strongest motives for desiring to be married to her, and none operating in a contrary direction. The hypothesis is, that though he certainly desired that the world should suppose him to be her husband, he might not desire really to be so, that he might wish to be able at any time to get rid of the connection. To such a suggestion I can only say that it is one which may always be made in the case of persons who have passed their lives as husband and wife, but as to whom there is no direct evidence when and where the marriage was entered into—persons, in short, who, in the language of Scotch law, are said to be married persons only by habit and repute, and it is a suggestion to which it is very dangerous to listen after the death of those who, if it had been made in their lifetime, or the lifetime of either of them, might have been able to clear up all doubts. Even if, at an earlier stage, Campbell might have been desirous of getting released from the connection, it is difficult to suppose he could have had such a wish when she had given birth to many children, all born when they might have been what he certainly represented them to be—his legitimate children. How often do we find that when a man has been living with a woman as his mistress, under the impression that he will be glad to get rid of the connection at some future time, and to be at liberty to contract marriage with another, if the conduct of the woman has been irreproachable except in her connection with him, and he has lived long with her, and more especially if he has a family by her, his feelings become bound up with hers, and there is hardly any sacrifice he would not make to be able to convert that illicit into a lawful connection, to cause the woman to have been his wife from the first, and to remove from his offspring the taint of bastardy? In England this can't be done. In Scotland it may. I will not make a single observation on the policy of the Scotch marriage law, but that law being as it is, the presumption seems to me almost irresistible that during the twenty-two years after the death of C. Ludlow, during which Eliza Maria lived with Campbell as his wife, and bore him six children, and was received and treated as his wife by his family and friends, he must have desired to make her his wife, and his children legitimate, which he might have done at any time during that long period. As to the letter to the War Office, I think that the evidence preponderates that a ceremony did take place in 1781, though the parties must have known it was

invalid. But the question remains—whether its existence is sufficient to rebut what would have been if it had not existed, the irresistible presumption of marriage afforded by the rest of the evidence. I think this bigamous marriage ceremony did not prevent parties to it from afterwards becoming husband and wife if they were minded so to do. The letter is but hearsay, and can only be looked to as a declaration by a member of the family made in a matter of pedigree in connection with all the other evidence. Its effect is to show that she was not a member of the family, and consequently not a person whose declarations could be received. I have doubt whether, if objected to, it could have been received in evidence; but I mention the doubt only to prevent its reception being supposed to receive the sanction of the House. I deal with it as evidence in the cause. It was a declaration for a special object behind the back of all parties interested in disputing or sustaining it. Nothing could be more natural than that the woman who had passed as Campbell's wife should after his death wish it to be believed that her marriage preceded the time when she lived with him as his wife. The inference of marriage afforded by the evidence is not removed by the fact that, after the death of the husband, the widow, to effect a particular object, represented the marriage to have taken place at a different date and in a different manner from that which really gave it efficacy. The case of Cunningham was not a decision that a connection which in its origin was only that of man and woman, could not become the connection of husband and wife. Where the connection is in its origin illicit more evidence or different evidence may or may not be necessary to satisfy a court that marriage has been contracted. Still it is a matter which must always depend on the particular facts in proof, and I can't understand Lord Eldon as deciding more than that, in the Balbougie case, there were not such facts as would justify the inference.

Lords Westbury and Colonsay concurred.

Affirmed with costs.

LONGWORTH *v.* YELVERTON.—*July* 30.

(In the Court of Session, March 10 1865, 3 Macph. 645.)

Proof—Reference to Bath—Consistorial Action—1 *Wm. IV.* c. 69.

These actions of declarator of marriage and of putting to silence were conjoined, and, after proof, the L. O. (Ardmillan) found that the parties were not married. The First Division held they were married. On appeal the H. of L. reversed, and held they were not married. Yelverton, Nov. 19, 1864, petitioned the Court to apply the judgment of the H. of L. Appt. thereafter, Nov. 28 1864, craved leave to give in a condescendence of *res noviter*, which the First Division, Dec. 10 1864, refused. Upon this, appt. tendered a reference of the whole cause to the oath of Yelverton. The Court refused to sustain the reference, and Miss Longworth appealed.

Lord Chancellor (CHELMSFORD)—It must be taken as a settled rule in Scotland that there may be a reference to the oath of a party at any time between the closing of the record and the extracting of the decree, although every other mode of proof has been tried and has failed. If the reference to oath is made originally, there can be no subsequent trial, Stair IV. 44-2. But, however strange it may appear to those unaccustomed to the practice

of the Scotch Courts, that a party having attempted to prove a case by testimony, and having failed, should be allowed almost at the last moment, even after final judgment, to resort to a new method of proceeding, though he had his choice from the first—yet such being the law we are bound not to question but to administer it. The reason why this reference to oath is allowed at so late a stage of the proceeding seems to be that until judgment is extracted the cause is still in Court. This being so, there can be no difference in principle between the case where a judgment is final in the Scotch Courts because not appealed from and a final judgment of this House which equally requires extract before execution can issue. He therefore thought the reference was competent in respect of the time at which the minute was tendered. With respect to the competency of a reference to oath in a declarator of marriage, he was of opinion that, whatever may have been the practice formerly, since 11 G. IV. & 1 W. IV., c. 69, such a proceeding was incompetent. Sec. 33 enacts that all consistorial actions shall be competent only before the Court of Session; and by sec. 36 no judgment in favour of the pursuer shall be pronounced in any consistorial action enumerated until the grounds of action shall be substantiated by sufficient evidence. In Muirhead *v.* Muirhead (28 May 1846, 8 D. 786) which was an action of separation *a mensa et thoro*, brought by a wife, the husband admitted on record conduct which in the opinion of the L. O. was sufficient to justify decree. Upon the case coming before the Court, Lord Mackenzie said, and the Court concurred, "I read the words 'sufficient evidence' as meaning sufficient evidence independent of the admissions of the party. I think the Act meant entirely to exclude admissions and require extrinsic evidence." Now, it was clear that an admission upon record can never be regarded as evidence; but the Court could not have meant to say that, if proof had been led in the case, admissions proved to have been made by the husband that he had ill-used his wife, would not have been evidence, and might not have been sufficient evidence. But an oath upon reference was not evidence at all. He then read from the opinion of Lord Colonsay in the Court of Session on this point. As a party, by referring to the oath of his adversary, renounces all other proof, and as the oath under reference is not evidence, a decree in a declarator of marriage, founded upon this mode of proceeding, would be a violation of the express words of the statute, as the grounds of the action would not have been substantiated by sufficient evidence. His Lordship then stated an opinion coinciding with that of the majority in the Court of Session upon the objection to the reference in respect that the interest of third parties would be prejudiced by a decree founded upon an oath affirmative of the reference. He then considered the objection to the reference that the answer to it in the affirmative—an answer which appt. must be taken by her reference to expect—necessarily involved an admission by respt. of criminality. If respt. were to admit the alleged marriage between himself and appt., he must confess that he has been guilty of bigamy, and this necessary effect of an affirmative answer plainly appears upon the record. Appt. said, in her printed case, there were cases in which a reference was refused, on the ground that a party should not be compelled to swear *in suam turpitudinem*. But all these cases were prior to 1 W. IV., c. 37, sec. 9 of which abolished infamy as a ground of incompetency in a witness. The 15 and 16 Vict., c. 27, further removes all impediments to the admissibility of the evidence of persons convicted of crime. In the present state of the law the

parties in the cases of Rogers *v.* Cooper, 2 S. 444; MacEachern *v.* Ewing, 3 S. 410; and Thomson *v.* Young, 7 S. 52, who were not obliged to swear *in suam turpitudinem*, would now be competent witnesses in similar cases, with the option of declining to answer any question that might criminate themselves. Such was the argument on this point, which left out of view one important consideration. It was true that the party in a reference to oath might refuse to answer, if thereby he would criminate himself, but then the effect was that he was taken to have confessed the facts referred; and exactly the same benefit resulted to the party making the reference as if he had obtained an affirmative answer. In the present case, therefore, respt., if he answer affirmatively, would have admitted himself to have been guilty of bigamy; or, if he had refused to answer, Mrs Forbes would be conclusively deprived of all rights acquired by her marriage with him. All the preceding objections led to the conclusion that the Court of Session was right in refusing to sustain the reference. A reference to oath was not the absolute right of a party, but it was in the equitable discretion of the Court to admit or to refuse Lord Moncrieff, in Pattinson *v.* Robertson, 9 D. 226. Therefore assuming the competency, the Court below was right in the exercise of its discretion in refusing to sustain the reference in this case.

Lord CRANWORTH would have come to the same conclusion independently of 1 Wm. IV., c. 69. Though the reference might be allowed as between two parties without leading to absurdity, yet the moment it came to involve the interests of a third party, it could not be the law of Scotland, or of any civilised country, that such a reference in a declarator of marriage was to be permitted. There were no cases which clearly decided that a reference involving the interests of third parties was ever allowed, and if there were, the House should hesitate before it sanctioned them. But if such cases did exist, then, even if the reference were competent, the Court in its discretion ought not to allow it.

Lord COLONSAY concurred, reserving his opinion as to the Act.

Appeal dismissed.

CARLETON AND OTHERS *v.* THOMPSON AND OTHERS.—*July* 30.

(In the Court of Session, Feb. 11 1865, 3 Macph. 514).

Succession—Residue—Vesting.

Andrew Hunter died in 1811, and left a trust-deed dated 1808, whereby he said:—"The residue of my estate I direct and appoint to be vested in my trustee for behalf of my daughter, Mrs O'Reilly, in liferent, exclusive of the *jus mariti* of her husband and her children in fee, to be kept in trust by them till they in their discretion shall see proper to settle it in the most safe and secure manner on her and her children, and in the event of her decease without issue of her body," then to certain nieces named. Mrs O'Reilly, the natural daughter of Hunter, was married in 1808, and died 1861. Some of her children were born before testator's death, though she had no children at the date of the deed. The question now arose whether her children had a vested interest from the date of the death of the testator, or only from the death of the liferentix. The L. O. (Jerviswoode) and the First Division held that a share of the residue vested in each child born after the testator's death at its birth. The two children born before the testator's death, the others having all died before the liferentix, brought this appeal. The judgment of the Court of Session was affirmed with costs.

THE

JOURNAL OF JURISPRUDENCE.

THE DEBTS RECOVERY ACT.

THIS is a very remarkable production. When the Conservatives were last in power, the Lord Advocate of that day left the stamp of a master mind on the legislation of the country, and secured for his party a reputation as Law Reformers, which the present measure will do much to overthrow. We hear it condemned on every side. Every person who is practically conversant with the business of the Sheriff Court—Sheriffs, Sheriff-substitutes, Sheriff Clerks, and the legal profession generally—seem to be at a loss to understand how such a measure ever received the sanction of the Legislature; and although the trading classes may fondly suppose that they have now got a form of process which will put an end to the evils of which they have for some years complained, we can assure them that they have been completely taken in, and that the Recovery of Debts Act will make things worse instead of better. A few months will show in actual practice the truth of what we say. In the meantime, we beg the profession, out of respect for two honoured names, generously to refrain from calling it either the Patton Act or the Gordon Act. From what we know of these gentlemen we feel persuaded that they never could have had any connection with this Act, save under some sinister influence, of what nature we do not know, but with which probably they were powerless to contend. When the Lord Advocate comes to see, in its actual operation, the pernicious character of the measure, we are sure he will not be disposed to throw any obstacle in the way of its being speedily amended.

We do not desire to speak with the smallest disrespect of the agitation of which this piece of legislation may be regarded as the fruit. On the contrary we think there was much justice in the complaint, that whereas in England there now exists a summary form of process for the recovery of tradesmen's accounts up to £50, in Scotland one dare not sue for more than £25, without running the

risk of being dragged through all the mazes of a litigation in four separate Courts—before the Sheriff-substitute, Sheriff, Lord Ordinary, and Inner House; while even as regards cases between £12 and £25, the appeals from the Sheriff-Substitute to the Sheriff are far too numerous, and a simple enough case is apt to produce, after many months' labour, a very huge process. Not only was a decree in absence a very costly proceeding, but in litigated causes any unprejudiced person must see that the complaints made of the time and expense required in Scotland for the recovery of a £40 or £50 debt were amply justified. But wherein lay the evil? Not certainly in the forms of pleading, which for many years have been reduced to the very minimum of brevity and simplicity,—one paper for the ground of action, one for the answer, then a proof, and then judgment. If there is to be any formality at all in legal procedure, it is impossible that the existing Sheriff Court forms could be rendered more brief or better adapted for the purpose which they are intended to serve. The evil lay in the superabundant facilities afforded for litigating about mere questions of fact. In England the jury, or the judge who acts the part of a jury, is final upon the facts; and an appeal lies to the Supreme Court only on the questions of law which may arise on the facts. In Scotland we are never done disputing and debating as to whether a particular point is proved. In short, for the great bulk of mercantile questions there are too many courts to be gone through before a final judgment can be obtained; and this, therefore, was the main question to which the Lord Advocate ought to have addressed himself—to what extent might this reiterated right of appeal be safely restrained?

The mercantile community would fain have made the Sheriff-Substitute absolute in all cases under £50; and with some modification they were prepared to see the existing small debt jurisdiction extended to that sum. Two objections to this course, however, have always appeared to us to be insuperable. No judge can be intrusted to decide upon the rights of his fellow-citizens without the terror of a court of review constantly hanging like a sword of Damocles over his head. It is strange, but nevertheless it is a fact abundantly verified by daily experience, that the most virtuous of men will sometimes conduct himself as if he were totally devoid of all sense of duty, when he feels that he is amenable to no one but his own conscience. He is then practically irresponsible, which no man ought to be. Therefore, while a properly regulated right of appeal involves no hardship to the public, seeing that it is not exercised in one case out of a hundred, it has a most salutary effect on the judge who does not know but that it will be taken in any one case of the ninety-nine. In the second place, it is the great function of a court of review, not simply to determine the rights of parties, but to maintain the unity, coherence, and certainty of the law; and were every Sheriff-substitute left to do that which seemeth right in his own eyes, we should have a different law for every county; and the result

would be a system of confusion, such as was experienced under the *coutumes* of ancient France.

The first important feature in the new practice is the abolition of the Minute of Defence, and the substitution of a "Note of Pleas," which is to be framed by the Sheriff-substitute. We are free to confess that we have never had any great admiration for the manner in which the pleadings are prepared in Sheriff Courts—the reason being that the procurators find it to be their interest to pay more attention to conveyancing than to the study of the principles of pleading; and, therefore, we do not think much inconvenience will result from laying the duty of framing the issue to be tried on the Sheriff-substitute. The science of pleading is a branch of professional knowledge with which these functionaries *ought* all to be familiarly acquainted; and if by some the subject has been hitherto too much neglected, the deficiency will in all probability be observed only in those places where there is abundant leisure for its being speedily repaired. This, therefore, will probably be on the whole an improvement. The Summons must still set forth, in a technically relevant form, the origin of debt, or "*ground of action.*" At the first diet of compearance, the pursuer is to explain the nature of his action, and the defender is to state his defence. The Sheriff may, if he think proper, then send the case to the ordinary roll; but it may be assumed that this is a power which will hardly ever be exercised, unless it appears to be a case, of the nature of an equitable suit, requiring condescendence and defences; and limited as the application of the statute is, such cases must be rare. Having compressed the speeches of the parties into the one or two propositions of fact or law on which the case turns, the Sheriff-substitute's Note of Pleas will probably be found to raise a much more intelligible issue than is attainable under the existing system of putting into the Minute of Defence every possible fact and circumstance connected with the dispute. The Sheriff is then to fix a time and place for the trial. No note of evidence need be taken, unless the parties require it; and when it is to be recorded, the Sheriff-substitute is to take it down himself, or dictate it to a clerk, or if either party desires it, he may obtain the services of a short-hand writer. It is then provided that the Sheriff-substitute shall pronounce an interlocutor setting forth the separate findings in law and fact on which he has proceeded in giving judgment.

Thus far we do not think that the new form of process can be seriously objected to. The sections of the statute with which we have dealt are in one or two instances very awkwardly expressed, and some difficulties will undoubtedly arise from the partial incorporation of some portions of the Small Debt Act. But these objections are of less moment than the extraordinary mode of review which has been established. The right of appeal, first to the Sheriff, and then to the Court of Session, on facts as well as law—nay, on the admissibility of a piece of evidence which probably at the end of

the day may turn out to be of no consequence—cannot fail to cause much dissatisfaction. This is the more to be regretted, as the course which should have been adopted was clear and simple. Where the evidence is recorded, the appeal should have lain direct to either division of the Court of Session, which, doubtless, would have disposed of appeals under the Act as cheaply, as expeditiously, and as satisfactorily as appeals in bankruptcy cases, which for more than ten years have been taken direct from the Sheriff-substitute to the Supreme Court. Where the evidence is not recorded, the parties should have been entitled to demand a case for the opinion of either Division on the questions of law involved. The latter method is the form of review from the English County Courts to the Superior Courts of Westminster; and in our own country it has worked singularly well for thirty or forty years under the Excise Acts, as well as in later years under the Registration Act and the Valuation Act. A judgment of authority, embodying the opinion not of a single judge, but of four, would thus have been obtained for the bare cost of the argument, without any delay. We are curious to know on what grounds it has been rejected in favour of the very anomalous method which has been adopted. It seems as if some devoted follower of the Conservative cause, sick and weary with waiting for that Sheriffship which was to be the reward of his consistency and patience, had been always whispering in the ear of his chief, "*Whatever you do to please these traders, do nothing to imperil the double Sheriffship: don't ignore the Sheriff as he has been already ignored in the bankruptcy statute; otherwise, what is to become of* US? Now that we are once more in power, let the country writers be sacrificed if the sacrifice be necessary for your popularity; but the interests of the party and its legitimate rewards are paramount." Hence that marvellous display of ingenuity exhibited in section 11 and 12!

The substance of these two Sections is as follows:—When the evidence has been recorded and a party is dissatisfied with the judgment of the Sheriff-Substitute, he may write beneath the Interlocutor—"I appeal against the judgment of the Sheriff-Substitute." He is then to subjoin a "note of the legal authorities on which he founds." The Sheriff-Clerk then transmits the papers to the Sheriff. The Sheriff is directed, "without delay, to consider the appeal, and he may either alter or affirm the interlocutor under review; *or he may order a new trial.*" The Sheriff-Clerk on receiving the judgment of the Sheriff must transmit a copy thereof through the Post Office to the parties and their procurators (apparently at his own expense). Either party may then appeal to either Division of the Court of Session, which may alter, or affirm, or *order a new trial.*

"The decree pronounced on the re-hearing by the Sheriff or Sheriff-Substitute shall be treated in all respects as if it had been pronounced by them in the first instance." In other words a new trial may be ordered again; and so on up and down again *ad infinitum.*

This brief statement, we hope, is sufficient to let the mercantile community understand what it is that they have got under the guise of an important Conservative measure of law reform. We already know something of what new trials are in the Court of Session; and there is nothing in our experience of the system of retrying questions of fact, to justify an extension of the evil to the Sheriff Courts. If ever a government officer, with a beacon warning him of the peril, wilfully and blindly chose to run his vessel on the rocks, that person is he, whoever he is, who is responsible for this mischievous addition to the forms of process in the Sheriff Courts. Why this everlasting re-hearing and re-trying question of fact? *Interest reipublicae ut sit finis litium;* but apparently a Sheriff-Substitute is not fit to be trusted with the decision of matters of evidence, or with the framing of a special verdict sufficient to raise the question of law on which the ultimate decision of the case shall depend. Surely the time is gone by for this position being maintained, but it is characteristic of the manner in which Scotch business is attended to in Parliament, that not a single voice was raised against the proposal when the bill was before the House of Commons. Where was the Dean of Faculty, where was the learned M.P. for the Wigtown Burghs?

Observe the theory on which the Statute proceeds. The judge of the first instance has heard the parties, adjusted the issue and seen the witnesses. The Sheriff Principal has had none of these advantages. With nothing but the curt and it may be imperfect notes of pleas and of evidence before him, a lawyer, in four cases out of five not a bit better than his Substitute, is required to say "without delay" whether the judgment is right or wrong. From a judge who hears and sees, you are to appeal to another who is blind and deaf. He may completely misunderstand the case from the notes which he himself did not take, but nevertheless he is invested with the power of reversing the interlocutor or of ordering the whole thing to be done over again *ab initio*. We should like to know how such a proposal would have been received by the House of Commons, had it related to England instead of Scotland. What would the *Times* have said and the British public have thought of an appeal from the County Court judge of Liverpool to his brother official at Manchester, or *vice versa?* It will be said that this system of reviewing on facts permeates the whole of Scotch legal procedure. If so, it is high time it were stopped, at least in cases below a certain amount; and if it is continued at all, the appeal should only be to either Division of the Court, where, instead of one, there are four judges whose opinion is matured with the aid of counsel for the parties.

Of course the authors of the Act know quite well that if all this system of appealing and of ordering new trials, for the sake of magnifying the office of Sheriff, had to be paid for according to the usual scale of professional remuneration, a storm would have been raised which would probably have been fatal to their bill. Hence, to disarm opposition, the ingenious expedient is devised of not paying

for the work done by the procurators. Hitherto it has been supposed that the only legitimate method of obtaining cheap law is by simplifying and shortening procedure. It has been reserved for the present government to introduce an entirely new plan, which has the singular merit of reconciling the conflicting interests of the commercial community who want cheap law, and that of their professional followers whose wish it is that the public shall *want* it. First by continuing the system of appealing from the judge who hears the case to the judge who does not, the doom of the double Sheriffship is for a time averted; next, to satisfy those who see nothing to admire in the system, it has been provided that the practitioner shall have only one slump fee for everything he does,—no matter how much or how little, in the conduct of a cause.

The fees allowed by the Act in contested cases are when the claim is under

L.20	. . . .	30/
30	. . . .	40/
40	. . . .	60/
50	. . . .	80/

These fees are the whole sums exigible for taking instructions to prosecute or defend the action, instructing officers to cite parties or witnesses, or to arrest on dependence, revising summons and citation and execution, precognoscing witnesses, attending and signing appeals and "*generally doing everything requisite for commencing and carrying on the action or defence until final judgment or decree in the Sheriff Court.*" Every one of these steps may possibly involve the procurator in a heavy action of damages; but the pitiful allowance above mentioned is all that he is entitled to recover. Nay, he is not to have recourse against his own client. Worse still, he is not allowed to make a special bargain with his own client. Than the fees mentioned in sec. 18 "No other or higher fees shall be allowed to be taken for any matters done in any cause raised under the authority of this Act . . . . whether as between party and party, or between *client and agent.*"

That the public may quite understand the injustice of this, we direct attention to the fees allowed in the County Courts of England.

Costs allowed to Counsel and Attorneys where the amount claimed does not exceed £20.

Between Party and Party,

In the case of a *Plaintiff*, where £5 or upwards is *recovered*,	£	s.	d.
The Counsel's fee is	1	3	6
The Attorney's fee is	0	15	0

In the case of a *Defendant*, where £5 or upwards is *claimed*, the same fees can be allowed; but in neither case is any fee allowed unless by order of the Judge.

Between Attorney and Client.

Where the Debt or Damage claimed	exceeds £2.	exceeds £5.
Attorney's fee	£0 10 0	£0 15 0
Counsel's fee	1 3 6	1 3 6

Costs and Charges paid to Counsel and Attorneys on sums claimed exceeding £20.

As well between Party and Party, as between Attorney and Client.

Letter before suit, ...	£0 3 0
Instructions to sue or defend, ...	0 5 0
Attendance and entering Plaint, including particulars of demand and copies, such particulars and copies being signed by the Attorney, ...	0 10 0

*** The total amount of these items to be entered on the Summons.

Examining and taking minutes of the evidence of each witness afterwards allowed by the Judge, ...	£0 3 0
Attending Court and conducting cause where no counsel employed, ...	1 10 0
Witnesses' expenses in conformity with Rule, . .	
Attending Taxing Costs, ...	0 3 0

Occasional Costs.

Attending to apply for Summons out of the district, .	0 4 0

*** The amount of this item to be entered on the Summons.

If plaintiff abandon action, and give notice thereof, attending settling, ...	0 3 0
Notice to produce, notice to admit, notice of application for a new trial, or to set aside proceedings,—including copies or duplicate originals and service,—and notice of especial reference and copies, including particulars and copies in cases of set-off, and attending Registrar of the Court therewith, such notices, particulars, and copies being signed by the Attorney,	0 5 0
Attending inspecting Documents, ...	0 5 0
Mileage, or way from the attorney's place of business to place of inspection of documents,—for each mile, not exceeding in the whole twenty miles, ...	0 0 6
Preparing confession or statement of agreement under sec. 8 or sec. 9 of 12 and 14 Vict. c. 61, where prepared by plaintiff's Attorney, including all incidental attendances, .	0 7 0
All necessary affidavits, including filing each, . .	0 5 0
Oath, sum paid, ...	
Attending to enter up judgment by default, . .	0 3 0
Attending Court for an order to bring up a prisoner to give evidence, ...	0 4 0
Instructions for, and drawing and copying brief in cases in which counsel employed, including attendance on counsel therewith,	2 0 0
Fee to counsel and clerk, sum paid, not exceeding, .	3 5 6

Attending Court on trial, with counsel, . . .	£0	10	0
Attending Court to support or oppose motion for new trial, or motion to set aside proceedings, or motion for a change of venue, including instructions, or any other necessary attendance, where no counsel employed, . . .	0	15	0
Attending in the last-mentioned cases with counsel, .	0	10	0
Fee to counsel and clerk, ...	1	3	6
Any attendance at the office of the Registrar, which he may upon taxation think was necessary, . . .	0	3	0
Every bond given under sec. 70 of 17 and 20 Vict. c. 108.,	0	7	0

New Trial.

Costs to be allowed on the same scale as on the original trial.

Costs of the day on adjournment of cause,—

Attorney for attending Court where no counsel employed, .	0	15	0
Attending with counsel, ...	0	10	0
Refresher fee to counsel and clerk, . . .	1	3	6
Witnesses' expenses same as on trial,			

Arbitration.

Attending reference without counsel, for each sitting, .	1	0	0
Attending reference with counsel, for each sitting, .	0	15	0
Fee to counsel and clerk for each sitting, sum paid not exceeding	2	4	6
Witnesses' expenses same as on a trial.			

It is not necessary to dwell on the contrast here presented, or on the ridiculous anomaly of saying almost with the same breath that our procurators must have a higher standard of education, but shall only have porter's wages. One year an Act is passed to exclude from the profession all but scholars and gentlemen, and, *pour encourager les autres*, we have next year another Act cutting down fees to a vanishing point. This bill either goes too far or it does not go far enough. If it is founded on a sound principle, let it be extended to other professions and branches of industry. Let it be enacted that the tailor and the grocer shall be limited to a certain maximum in selling their commodities; and that medical men shall have no other or higher fees than say five shillings for a fever, and half-a-crown for a bad diarrhœa.

This section of the statute is at once unjust and impolitic—unjust because founded on the principle that the labourer is *not* worthy of his hire: impolitic because it will degrade the administration of the law, and deprive the judge of that professional assistance without which justice cannot be administered. The scale of remuneration will drive all decent men out of our inferior courts, and leave their places to be filled by a pack of wretched debt-collectors, without education, and with no pretensions to refinement, or possibly reputation.

We shall always be the last to oppose any well considered amendment of the law. Let our method of procedure be shortened and

simplified as much as possible ; but to whatever length this may go, something will always require to be done by the professional adviser of the litigant, and whatever he does, the lawyer ought surely to receive, like every other member of the community, the fair reward of his services.

No doubt by sec. 20 the Court of Session is empowered after due inquiry, by Act or Acts of Sederunt, to make such alterations by way of increase or decrease as shall seem *needful* in the fees or dues authorised to be taken, in *contested cases*. But if the Court of Session is to have such ample powers in this matter, what is the use of section 18 ? The two sections together are framed in a way to which the House of Commons, and Lord Redesdale in the House of Lords, are not in the habit of giving their sanction, for Parliament is here made to delegate its functions to the Court of Session. First it says certain fees must be charged ; and then that the Court of Session may enact any other fees it thinks proper. If the Lords of Session are the proper judges of what fees may be charged, why has Parliament said anything at all on the subject? We venture to say that the statute book may be searched in vain for many years back for any similar instance of the House of Commons being committed to the folly of doing and undoing a thing in almost the same breath. This circumstance, in our apprehension, conclusively shows that the whole statute is a CHEAT. We understand that an honourable member was to have moved that it should be referred to a select committee ; but by some means it was smuggled through Parliament undiscussed and unnoticed. For our own parts, we confess that though attending pretty closely to the proceedings of the Houses of Parliament, we were under the impression until the beginning of August that the bill was to suffer in the usual "massacre of the innocents," and that chiefly because we could not imagine that a measure of the kind could pass without some discussion of the principles (if any) on which it was founded. Who can tell, however, what principles lie at its foundation? What can be more absurd than its limitation to merchants' accounts and other the like debts subject to the triennial prescription? Why multiply our forms of process, when every one is crying for consolidation and simplification? If the new method is sufficient for the administration of justice in the cases enumerated, the same method ought to be no less efficient in all cases. A dispute about a tailor's bill is surely not a less complicated question than an action on a bill of exchange? The framers of this Act stand convicted on the very face of it of having no confidence in their own measure. We know not which to admire most, the duplicity of the Government, or the selfishness of the traders, who, beginning with the cry for law reform, are conciliated and pacified with a bill which *appears* to be sufficient for their own particular case.

But while the Act thus deals with the country procurators a curious exception is made in favour of practitioners in the Supreme Courts. Things there are to remain as they are. Section 18 applies

to "all matters done in any cause raised under the authority of this Act, *except the expenses incurred in any appeal to the Court of Session*, which shall be taxed and decerned for in common form," and these are to be regulated by act of sederunt in the usual way. The poor provincial procurator is driven to the wall without compunction, but the Edinburgh W.S.'s and S.S.C.'s are sacred! Now, as uninterested outsiders, we are bound to ask, Why is not equal justice done to them all? Who is most deserving of consideration—the man who prepares the case and pleads it, or the man whose sole duty is to receive the papers by post, hand them to counsel, and sit behind him when the case comes to be argued? Which is the greater evil, and the one most loudly calling for amendment, the cost of litigation in the Supreme Court or the Sheriff Court? If the former, why is it let alone? It is vain to get any intelligible answer to these inquiries; but this portion of the bill indicates a partiality which we venture to prophesy will defeat the very object which it was intended to serve. The legal profession in Scotland is not altogether without influence, and we shall be very much astonished if they do not at once betake themselves to those measures of retaliation which the authors of this act have unwittingly prepared for their adoption. The cry of the mercantile community hitherto has been, "Give us in Scotland the process of the English county courts." What if the lawyers should now join in that appeal, and insist that, *quoad* L.50 causes, whatever is good for England is good also for Scotland? Do the Parliament House coteries, which are supposed to have the ear of the Lord Advocate for the time being, understand to what this would lead? It would lead to the extension to Scotland of the County Court Amendment Act, which was passed this last session, the 7th to 10th sections of which are thus summarised by a writer in the *Times*:—

"1. No debt whatever under L.50 can be sued for in any of the superior courts, except by leave of a judge of one of those courts. It may be safely said that such leave will seldom, if ever, be granted.

"2. No breach of contract causing damage under L.20 can be sued for in any of the superior courts (so as to entitle the plaintiff to his costs) unless the judge who tries the cause certifies that he approves of the action being brought in the superior courts. It may be safely said that such certificate will scarcely ever be given.

"3. No trespass or injury whatever can be sued for in a superior court for damages of a smaller amount than L.10 (so as to entitle the plaintiff to recover his costs), unless the judge who may try the cause shall certify the approval of the action. It may safely be said that such certificate will hardly ever be given.

"4. No insolvent person can maintain any action for "malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, sedition, or other action of tort"—in short for any wrong or injury whatever—in any of the superior courts, unless he can find security for paying the defendant's costs in case the action

should be unsuccessful, or unless he can convince a judge that the action ought to be prosecuted in the superior court; and inasmuch as the actions above specified are for the most part actions which require neither much law, nor much learning, nor much capacity of any sort to dispose of them, and inasmuch as more time is usually employed in trying them than is employed in trying other actions, no discreet judge is likely to withdraw them from the county court."

Any of our readers can easily picture the sad havoc which would be made in Court of Session business were these rules in operation in Scotland, and it is probable that not a single session will pass before these and similar proposals are being debated in a committee of the House of Commons on the whole question of the existing arrangements for the administration of justice in Scotland. Such are the results of that modern system of legislating in the interest of middle-aged coteries, which is equally dear to Lord Advocates of Whig and Tory politics.

Meantime, as the Act is now in force, the profession must make up their minds to understand it and make the best of it. No doubt an action for a debt of L.50 may still be brought in the Ordinary Court, but in that case the expenses must be modified to the sums allowed by the Act. There is thus no escape from its operation. But we must reserve for our next number a few notes on some points of practice which a perusal of the Act has suggested.

The Month.

Why should not Counsel be more employed in the Sheriff Courts? There might easily be a special debate roll for cases in which counsel are to appear, which the Sheriff-substitute might take on Monday. One can go and come between Edinburgh and all the leading towns in one day. Let the procurator keep his present debate fee for memorial to counsel, and let counsel's fee be limited to L.2, 9s. 6d. up to a certain sum—say L.25; L.3, 10s. 6d. up to L.50; and L.5, 5s. beyond it. A clever junior counsel should be able to get a good bag every Monday, if he attached himself to one court. It would do much to raise the tone of local bars, which do not always send their best men to the less remunerative work of the Court, and it would be of vast service to the Sheriff-substitute. An intelligent local practitioner writes to us that in his Court the debates are a perfect farce. "Procurators," he says, "never think of turning up a volume of Reports. Our Sheriff has just told me that he had spent two days this week cogitating on the question whether he could take a deposition under reference to oath, or was bound to grant a com-

mission. He found that the very point was expressly decided by the Second Division two years ago." Just fancy the misery of such a state of things to a judge who has been accustomed to see the amount of assistance expected by the bench, and rendered by counsel in the Supreme Court.

Queen's Counsel again.—Our contemporary, the *Law Reporter*, is very angry with the *Journal* because of its comments upon his article on Queen's Counsel. So great is his fury that he requires three pages to give vent to it, although his original article on the subject occupied only a page and a half. He denies that he "imputed motives" when he accused those who differed from him of being actuated "by mischief, or officiousness, or jealousy." The logic by which this denial is supported is amusing. He says he "cannot understand upon what grounds the proposal to have Queen's Counsel can be resisted"—that the grounds advanced against it are "either unintelligible, or insufficient;" and that, accordingly, he falls back "on some other cause," viz., mischief, or officiousness, or jealousy. That is to say, A cannot understand why B holds a certain opinion, and considers B's reason for it bad; *therefore*, when A accuses B. of being actuated by mischief, &c., A is not imputing a motive. The *Journal* is next accused of making the inuendo that the distinguished person who at the meeting of Faculty stated that the extended proposal would be withdrawn if there was decided opposition to it, made that statement "for the purpose of enticing members away from the division." This is a complete misrepresentation. What was said was this, that the statement made might have led members of the Faculty to leave the meeting before the division. To attempt to twist out of this an accusation of a dishonest motive against the gentleman who made the statement, is creditable to our contemporary's ingenuity, but discreditable in every other respect.

We come now to the matter which seems to have brought the *Reporter's* rage to the boiling point. The *Journal* had called a part of his effusion "ungrammatical." At this the *Reporter* flies off into the following elegant and modest detail of his educational career:—

"This argument," he says, "is very effective when attended by proof, but correspondingly weak when it is left, as our contemporary does, to mere assertion. To such proof we invite him, and before applying his mind to the task we beg to inform him, not from any feeling of vanity, but with the view of suggesting to him directions in which he may find material—and in the end it may be instruction—that we learned our grammar in a school where education was not thought to end when the habit of properly linking verbs and nominatives had been acquired, and our power of expression under teachers that had a knowledge of the resources of the English language beyond that of a musketry instructor."

Our contemporary seems to forget that the passage which was called ungrammatical, was quoted at length in the *Journal* as proof of the assertion. We must decline entering into any proof to satisfy the *Reporter's* mind on the subject. We cannot hope to teach English to one who could write the passage just quoted, who speaks of the

Journal's "rebuke of the propriety of our conduct," and who says that a certain circumstance is "the *consideration* above all others *that will promote the success*" of the scheme.

Another cause of anger is that the *Journal* took up seriously a "jocular" speech of the *Reporter* about the rattening of trades-unions. When a gentleman says he was joking, there is nothing for it but to apologise, which we now do, first, for not seeing the joke, although we are obtuse enough not to see it yet; and secondly, for having offended the *Reporter* by taking him to mean something when he meant nothing.

We have no room to waste on the *Reporter's* mock heroic statement about the privileges of the Bar, which he gives as if emanating from the *Journal*, though not one word of it is to be found in our article. If our contemporary's anger had not made him blind, he would scarcely have ventured to accuse us of "treating him to rhapsodies" which were of his own composition, and the style of which shewed them to be his, not ours. There was only one sentence in our article bearing on the subject in question.

The latter part of the *Reporter's* article is directed to the demolition of the proposal made by the *Journal* for the regulation of seniority in the Faculty of Advocates. It is unnecessary to do more than state that his objection to the proposal is that—"advocates are still to be allowed to judge for themselves, as to when they shall become senior counsel,—an extent of individual liberty which we thought objectionable." It will probably cause not a little surprise to those who have been induced to support the Queen's Counsel scheme to learn that the principal purpose of it is to enable the Faculty to compel members to become senior counsel whether they will or not. Yet this is the position which the *Reporter* gravely takes up. No wonder we were unable to see his *joke* when he spoke of "rattening."

The Post-Office and Circular Delivery Companies.—Sir Thomas Henry, Chief Magistrate at Bow Street, has fined the messenger of a Circular Delivery Company £5 for delivering a circular, as being an infringement of the privileges of the Post-Office (1 Vict. c. 33 and c. 36.) The conviction is under appeal by a case stated for the opinion of one of the Superior Courts of Law, but no procedure can be taken till November. In the meantime the decision of the Police Magistrate has seriously interrupted the practice of keeping a "little post-office," which has become very common in large cities, and which it is stated has received in Glasgow the sanction of the Board of Inland Revenue which sends its notices by this Company. It was also stated that the manager of the Company had obtained an opinion from the Lord Advocate in favour of the legality of the company's business. The decision of Sir Thomas Henry has been objected to on the ground that the Post-Office was intended for the transmission of mails to and from places distant from each other, and that it was not intended that persons living in the same towns or villages should

be compelled to send their letters or trade circulars from house to house by the postman. It seems unlikely that the legal validity of the decision will be successfully impugned; but it must be admitted that the Post-Office arrangements for transmission of letters within great cities are of recent adoption and are as yet most imperfectly carried out. For the convenience of the public, the Post-Office must, if it is to retain its monopoly, in this department (which for the sake of the revenue is desirable) make much more frequent deliveries and at a lower charge per letter for letters and packets going from one part of the same city to another.

Scottish Judicial and Legal Statistics.—A discussion at the British Association meeting at Dundee, and a conversation in the House of Commons on Aug. 15, have again called attention to this curious question, which Sir Graham Montgomery promised should be dealt with next session. Colonel Sykes, whose exertions are praiseworthy, says that a similar promise was made some years back by the Lord Advocate,—we presume by Mr Moncreiff. Mr Moncreiff at Dundee said that there was difficulty, from the arrangements of the Court of Session and the Sheriff Courts, in obtaining a return, —that there was no proper machinery. The fact is, that in this there would be little difficulty to willing minds. Let Parliament insist on having judicial statistics, and the obstructives, whatever they may be,—whether Sheriffs or other big-wigs who dread abolition, or Clerks of Court who dread work,—must give way. Another notable example of the reluctance in certain quarters to throw light on the dark places of the Scottish judicial system is furnished by the history of the return asked for and presented to Parliament of the number of Clerks of Court in Scotland who practise as agents before their own Courts. This is said to be lying *unprinted* in the library of the House of Commons. We hope that Colonel Sykes, or Mr M'Laren will get it brought to light either now, or, if that is impossible, at the meeting of Parliament.

Obituary.—HENRY HOME DRUMMOND, Esquire of Blair-Drummond Advocate, (1808), died at Blair-Drummond, on September 12, at the age of 84. He was one of the oldest members of the Faculty of Advocates. He was educated at the High School of Edinburgh and took the degree of L.L.B. at Oxford. He held the office of Advocate Depute, from 1812, and acted as crown prosecutor in several of the political trials in 1817 and the following years. He resigned this appointment and left the bar in 1821. In 1821 and 1826, he was returned as M.P. for Stirlingshire. In 1840 he was returned for Perthshire, after a contest with Mr George Drummond Stewart. He followed Sir Robert Peel in supporting the repeal of the Corn-Laws, and retired from Parliament at the dissolution in 1852, when he was succeeded by Sir W. Stirling Maxwell. While he sat in Parliament he took a prominent part in the conduct of Scotch business. He carried through the House of Commons the "Home Drummond" Act, 9 Geo. iv. c. 58, to regulate the granting of Publican's Certificates, the

General Turnpike Act of 1831, the Salmon Fisheries Act of 1829. He married Miss C. Moray of Abercairny, who pre-deceased him, and by whom he was the father of Mr G. Stirling Home Drummond of Ardross, who succeeds to the Blair-Drummond estates, as well as of the present Duchess Dowager of Atholl, and of Charles Home Drummond, Esq. of Abercairny. His father was the son of Lord Kames, and his mother was a daughter of Dr Jardine, one of the ministers of Edinburgh, who belonged to the Jardines of Applegarth. Mr Home Drummond took an active part in county business, and in the agricultural improvement of his property.

JOHN GRAY, Esq., Solicitor and Town-Clerk, Ayr, died on the 13th July last, aged 58. During his forty years connection with the legal profession, he held successively the offices of Joint Sheriff Clerk depute of the county, and Town-Clerk of Ayr, the latter for 15 years. He was long the county agent for the liberal party. He was extensively known, and was universally respected for his amiable disposition and his reasonableness in business transactions. From his long experience his authority was often appealed to in questions of court and municipal procedure. In the general intercourse of life he was a man of most kindly temperament,—social, genial and peace-loving, incapable of giving offence, and ever ready to "throw oil on troubled waters." The respect in which he was held was publicly marked by processions of the Magistrates and Council and of the Faculty of Procurators at his funeral.

DAVID CORMACK, Esq., S.S.C. (1834), keeper of the Minute Book and Register of Edictal Citations, died at Greenhill Gardens, August 28.

Appointments.—If we have blamed Government for its tardiness in filling the vacant Law Chair in the University of Glasgow, we are the more bound to give it credit for the selection they have ultimately made. It would not have been easy to find any one better adapted than Mr Robert Berry to meet the requirements of such a chair in our great commercial capital. Mr Berry's acquaintance with English law cannot fail to be a most important aid to him in his professional capacity, and to render his advice as a counsel especially valuable in a community such as Glasgow, having daily mercantile transactions with the dwellers on the south of the Tweed. At the same time that he is thus an acquisition to the legal profession in Glasgow, he will carry to the University the *esprit de corps* of an alumnus; and from his connection with the Scottish University Commission as its secretary, and with the University of Cambridge, where he obtained a fellowship, he will bring with him an intimate personal acquaintance not only with all our Scotch colleges, but also with the English University system. Mr Berry was called to the English Bar in 1853, and passed advocate in 1863, at the close of his labours as secretary to the Universities Commission.

The appointment of Historiographer Royal for Scotland, to which a salary or pension of £180 is attached, has been conferred by Her Majesty's Government on Mr John Hill Burton, Advocate (1831),

a political opponent. The merits of Mr Burton's recently published history, a legal view of which we propose shortly to lay before our readers, would have made it almost impossible to pass him over, even if our historians had been more numerous than they are. He already holds the office of Secretary of the General Prison Board with a salary of £700.

APPOINTMENTS—*Ireland.*—The Attorney-General, Mr Chatterton, has been appointed to the Vice-Chancellorship created by an Act of last session. He is succeeded as Attorney-General, and as M.P. for Trinity College, Dublin, by Mr Warren. The Solicitor-Generalship has been conferred on Mr Harrison, Q.C.

IMPROVEMENT OF THE LAW OF BILLS OF EXCHANGE.—The following suggestions have been made in a short pamphlet by Mr Grain :—

1. That days of grace be abolished. 2. That bills of exchange and promissory notes falling due upon any Sunday, Christmas Day, or Good Friday, or upon any day duly appointed as a close day in reference to bills and notes, whether for the purpose of any solemn fast, thanksgiving, public ceremonial, or holiday, shall be payable on the next working day following such Sunday, &c. 3. That for noting and protesting bills and notes, and for all purposes for which a demand of payment on the day of maturity is now necessary, a demand on the following day shall be sufficient.

The *Economist* says— 'The days of grace, originally a sort of absurdity, and inconsistent with the rigid punctuality of payment, which is the sole merit of a bill of exchange, have been abolished in France, Germany, Holland, Italy, and several other countries of Europe, and would certainly be altogether abandoned if we gave them up. The custom in such matters of mercantile countries ought to be uniform, and it can only become uniform by our making the change.

"The second suggestion would lessen the work of Saturdays. *Masters* now do not stay in the City upon Saturdays, perhaps do not come there; but clerks are detained longer than they would else be, because bills (often in large numbers, as when the 4th is on a Sunday) have to be presented and paid on Saturday, and cause much writing and labour.

"The third suggestion would facilitate the proper noting and protest of bills, which is now, in some cases, an unsatisfactory and hurried matter, and is transacted by notaries' clerks at late hours of the evening, when no other bill business is going on, and when it is not desirable that this should be done either."

SALE OF SHARES IN BANKING COMPANIES.—Mr Leeman's short Act (30 Vict. c. 29) for preventing jobbing in bank shares has already proved its efficiency. It enacts that no contract for the sale of such shares shall be valid unless it states in writing the respective numbers by which the shares are distinguished in the books of the company, or, if none such, the person in whose name such shares stand in the register of the shareholders as the proprietor thereof. It was designed to put a stop to the practice of jobbers, who sold shares they did not possess, then went into the market to procure them, and not unfrequently circulated injurious rumours for the express purpose of lowering the market value of shares they were under obligation to buy, for the fulfilment of the engagement. At first the brokers were indignant and refused to deal in bank shares at all; but they have recently thought better of it, and consented to comply with the requisitions of the law, by which honest dealers will certainly benefit in the end, for it will drive their dishonest rivals from the market.—*Law Times.*

TO OUR READERS.—We have again to express our regret that the great mass of the statutes of the session greatly so limits our space for original papers. We have it in contemplation to discontinue in future years the publication of Acts of Parliament, both for this reason and on account of the cheap rate at which a more complete collection than ours is provided by Messrs Blackwood. But before finally resolving to take this step, we shall be ready to consider any objections to it which any of our readers may suggest. Of course by discontinuing to publish the statutes we should be enabled to devote a very considerable space to other matter.

Correspondence.

THE "DEBTS RECOVERY ACT, 1867."

(FROM OUR GLASGOW CORRESPONDENT.*)

OUR Sheriff Court system, although not perfect, is yet so excellent and valuable, and has proved itself so well adapted to the wants of the community, that we are naturally jealous of all attempts to improve it. We are afraid of innovations which may not be improvements; afraid that the "blessed amending hand" may be applied too rashly, and that so venerable and useful an institution may, in process of time, be "improved off the face of the earth."

To this feeling, laudable in itself, but apt to be carried too far, may no doubt be attributed much of the opposition and hostile criticism which the Bill originally presented by the Lord Chancellor in February last, and now passed into law as the "Debts Recovery (Scotland) Act, 1867," met with during its progress. And it cannot be said that such apprehensions are altogether groundless. During the agitation and discussion which preceded the passing of the Sheriff Court Act of 1853, two so-called *reforms* were much insisted on, viz., 1st, an extension of the provisions of the Small Debt Act to all cases under £50 in value, and 2d, the abolition of the office of Sheriff-Depute and the establishment of "Resident Sheriffs" in each county. Fortunately neither of these "demands of the country," as some agitators chose to call them, was granted; but when such extravagant demands are made it is not surprising that those who understand and appreciate the benefits of the present system should regard all innovations with considerable apprehension.

Now, we do not claim for the present measure, any more than for its predecessors, the merit of absolute perfection; but we venture to predict that many of the objections which have been stated to it will be found in practice much less serious than was supposed.

That its leading provisions are merely permissive, we conceive to be a positive advantage, inasmuch as those who do not choose to avail themselves of its summary mode of procedure are at liberty to adopt the more familiar forms now in use; and the frequency with which the new forms are resorted to will, to some extent, test their merits in comparison with the old.

Another objection is, that it applies only to a particular class of debts and leaves others to be recovered under the old forms. But it is to be remembered that the measure is not intended to be final. If it be found advantageous in one class of debts it may afterwards be extended to others; and if, on the other hand, it does not prove to be a public benefit, it is all the better that its scope is limited. It was no doubt difficult to define a particular class of debts so as to avoid questions regarding its application; but the phraseology of the Scottish Statute 1579, cap. 83, which introduced the triennial prescription, has been wisely adopted, in order that the series of decisions following upon it may form a guide in the application of the

* Our respected correspondent warns us that in this instance the views which he enunciates are not to be taken as prevailing extensively in Glasgow. It will be seen from our own article on the subject that we also differ from most of his conclusions.

present act. This accounts for the quaint and antiquated terms in which the limits of the act are defined in the second section, which, to an unprofessional reader, may appear not a little singular. We have thus a valuable repository of precedents illustrating the nature of the debts to which the act is intended to apply; and it is to be hoped that objections to cases on the ground of their not being of the nature contemplated by the act will be comparatively rare.

Again, it has been objected to the act that its tendency is to encourage or invite appeals to the Court of Session by abolishing the necessity for finding security for costs in advocations and suspensions. But, while a great deal may be said in favour of the rule which imposes on an unsuccessful litigant in an inferior court the necessity of finding caution for costs before he can submit the judgment to the review of a higher, yet there may be as much hardship in enforcing as in relaxing it; and after all, considering that the appellant may sufficiently comply with the rule by finding *juratory* caution, which is seldom very substantial, the respondent does not lose a great deal by the necessity for finding caution being dispensed with.

Perhaps the most assailable point in the act is one about which comparatively little has been said, namely, the Table of Procurators' Fees contained in it, which are declared to "include the whole sums exigible, whether as between party and party *or between client and agent*, for taking instructions to prosecute or defend the action, instructing officers to cite parties or witnesses, or to arrest on the dependence, revising summons and citations and executions, precognoscing witnesses, attending proofs and debates, writing and signing appeals, correspondence, and generally doing everything requisite for commencing and carrying on the action or the defence until final judgment or decree in the Sheriff Court." Take, for example, the fees allowed for obtaining a decree in absence. This includes in an ordinary case at least one consultation with the client on the grounds of the claim, which may be intricate and complicated, framing the account or claim and making two copies, taking out a summons, instructing an officer to serve, and revising execution, producing summons after service, and attending the court obtaining decree, and afterwards procuring extract—for all of which the procurator is to be allowed, where the sum concluded for does not exceed £25, a fee of 7s. 6d, and where it exceeds £25 and does not exceed £50, a fee of 10s. The fees for contested causes are at least equally low, ranging from 30s. to £4. No doubt the Court of Session is empowered to make alterations "by way of increase *or decrease*" on the fees, but their lordships are not likely to interfere with them of their own accord, and as properly qualified procurators cannot be expected to accept such ridiculously small fees, it does seem probable that suitors may have difficulty in obtaining competent professional assistance in availing themselves of the act, and without such assistance it must necessarily prove to some extent inoperative and entail increased labour on the sheriffs. It will be unfortunate if the Act should fail in its operation from this cause; but if it should, an act of sederunt enacting a more liberal scale of charges appears to be the appropriate remedy. In the meantime, believing it to be on the whole a step in the right direction and an improvement in some respects on our present forms, we confidently hope that that branch of the profession whose interests are most likely to be unfavourably affected by it will lend their aid, as far as possible, in giving it a fair and impartial trial.

QUERIES.

I. Can any of your readers suggest what is the proper course to take in the following circumstances? D having taken a lease for 99 years under the Montgomery Act of ground exceeding an acre in extent upon an entailed estate builds a large villa on it, but fails to build a house of the value of L.10 for each half acre within the statutory period of ten years. D dies, and his trustees put up the property for sale; but the person to whom it is knocked down at the auction refuses to accept the title offered, founding on the late decision in *Miller* v. *Carrick*, March 29, 1867. I presume the purchaser, even though bound to satisfy himself as to title previous to the sale, cannot be compelled to implement the contract, as the title of the exposer is *funditus* null and void under the irritancy in the Act and lease. See *Hamilton* v. *Western Bank*, June 12, 1861, 23 D. 1035. Is this so? The proprietor does not wish to take advantage of the irritancy, and is willing to give a new lease to the trustees. Will this validate the lease, or is it *ultra vires* of the proprietor, as being an alienation in contravention of the entail? R. B.

II. When tutors, who are themselves next of kin, are dissipating the funds of their pupils, is an action for the removal of the tutors as "suspect" competent in the name of the pupils themselves, a tutor *ad litem* being of course appointed after the case is brought into court? The case of *Austin* v. *Wallace*, 21st Dec. 1826, 5 S. 177, does not quite amount to an affirmative answer. LEX.

III. A creditor recovers part of his debt from two cautioners, and ranks upon the bankrupt estate of his debtor to the effect of obtaining a first dividend, which makes up the amount due to him. How must the cautioners proceed in order to obtain payment to them in relief of a second dividend now declared, which the creditor who is fully paid cannot touch? Can they be sisted in place of the creditor, who is ranked, but cannot take the whole sum for which he is ranked, or ought they to have lodged contingent claims at an earlier stage? M. S.

IV. Can any of your readers inform me whether there is any authority or precedent in the law of Scotland or England for the following decision pronounced in a Small Debt Court by one of the ablest local judges in Scotland? A woman sued a pawnbroker for damages for abusive language and assault committed by his assistant in his shop in the course of a business transaction. The Sheriff decerned for a sum of damages, upon the ground that the assistant had been guilty of similar conduct ten months before, which had been brought to the knowledge of the employer, and that the employer had notwithstanding retained the man in his service. This application of a principle analogous to the doctrine of "the pushing ox in Exodus," may be defended by various arguments, although it has been keenly assailed in England during the past month (see *Times*, *passim*); but it seems inconsistent with the general rule that there can be no valid mandate to do anything contrary to law. It does not appear to be supported by any of the authorities referred to in Mr Guthrie Smith's book on *Reparation*, p. 145 sqq., or in Mr Clark's work on *Partnership and Joint-Stock Companies*, p. 254, 262 sqq. The question in all such cases is whether the delict for which the employer is sought to be made responsible was committed in the course of, and as part of the ordinary work for which the agent or servant is engaged. It may often be difficult to draw the line, and perhaps there may be no very clear distinction between the case in question and the embezzlement of money belonging to a client by a solicitor's clerk, or the misapplication by the partner of a legal firm of money entrusted to the firm for investment, in which cases respectively the principal and the firm are liable for the fraud of the agent, as was shown in the English case commented on in the *Journal* for September, p. 460. Nevertheless, I know of no precedent for the judgment referred to, and it does not seem consistent with received legal notions. Would an omnibus proprietor be liable for damages for an assault on a passenger who asserted that he had paid his fare, by a conductor who had previously to the knowledge of his employer committed a similar assault? I have known of a refusal by justices to entertain an apprentice's application for discharge on the ground of cruelty under 4 Geo. IV. c. 29, because the assault founded on was committed by the foreman of the employer, who was entrusted with the supervision of the employer's apprentices. The words of the statute, however, are perhaps sufficient to justify this decision, without reference to any principle of law.

PRAGMATICUS.

ENGLISH CASES.

RAILWAY—*Debenture—Companies' Clauses Act* 1845.—A debenture-holder filed a bill, on behalf of himself and the other debenture-holders, against the company for an account, and obtained the appointment of a receiver of the tolls and rates of the undertaking. Subsequently another debenture-holder, having obtained a judgment at law in respect of his debt, presented a petition in the cause before the hearing, praying that he might be at liberty to issue a writ of *fi. fa.* upon the goods and chattels, and execute an *elegit* upon the lands of the company:—*Held*, that the petitioner was not entitled to issue execution in respect of his judgment, except as a trustee for himself and all other debenture-holders entitled to be paid *pari passu* with him; and an inquiry directed whether it would be for the benefit of the debenture-holders to have the petitioner's judgment made available for their benefit. Wood, V.C., said: Sec. 42 of the Act consisted of two parts, one of which declares that debenture-holders shall be entitled rateably in their several proportions to "the tolls, sums, and premises," and the other that they shall be repaid "the sums advanced to them with interest, without any preference one above another by reason of priority of the date of their mortgages or of the meeting at which the same were authorized." It was clear, according to "Russell *v.* East Anglian Ry. Co.," (3 Macn. and Gor. 104, 20 L.J., Ch. 257), that if the petitioner had been a simple contract creditor who had recovered judgment at law, he would have been entitled to issue execution against the chattels of the company. He was not, however, in that position. He was a mortgagee who had accepted his security under the provisions of the 42nd sec. of the Act, and his rights must be expounded by the Act of Parliament. If the petitioner's claim were allowed, the consequences would be most inconvenient, because then all the debenture-holders in a company would rush for judgments, in order to realize their debts as soon as they were due, and thus would break up the undertaking, by virtue of securities which provided that they should acquire no preference or priority one over the other.—*Bowen* v. *Brecon and Merthyr Tydvil Ry. Co.*, 36 L.J., Ch. 344.

SUCCESSION DUTY.—A devised real estate to trustees upon trust, by sale or mortgage, to raise a sum of money, and subject thereto in trust for his son. The trustees sold the estate by auction in lots, and L bought two lots. Pending investigation of the title, the required sum was received out of the purchase-money of the other lots. The Commrs. of Inland Rev. having charged and received legacy duty in respect of the purchase-money of the lots sold to L,—*Held*, that the lots were protected, by sec. 18 of the Succession Duty Act, 1853, from any charge for succession duty. And, *semble*, the duty properly chargeable was succession and not legacy duty.—*Earl Howe* v. *the Earl of Lichfield*, 36 L.J., Ch. 313.

DIVORCE—*Costs of co-respondent.*—In a suit for dissolution of marriage, the jury found that the resp. and co-resp. had committed adultery together, that the petr. had condoned, and, further, that petr. had connived at his wife's adultery with another person, and they assessed the damages at one farthing. The Court dismissed the petition, and ordered petr. to pay the costs of the respt. and of the co-respt.—*Adams* v. *Adams*, 36 L.J., Pr. and Matr. 62.

RAILWAY—*Diversion of highway: Railways Clauses Act* 1845, *s.* 16.—A railway company has no right to alter a railway by diverting it unless such alteration is necessary for constructing the railway or the accommodation works connected therewith, and the mere saving of expense would not justify them in making it. Therefore this Court, by mandamus, upon the application of the owners of land adjoining the part of a highway which had been, by a diversion of it, cut off, ordered the company to carry the highway over the railway, or the railway over the highway, by means of a bridge.—*R.* v. *Wycombe Rail. Co.*, 36 L.J., Q.B. 121.

RAILWAY—*Mines: Railway Clauses Act*, § 71, *sqq.*—A railway company which has taken lands for their railway, under the Lands Clauses Act (8 & 9 Vict. c. 18), and the Railways Clauses Act (8 & 9 Vict. c. 20), with a conveyance in the usual form, are not entitled to prevent the owner of the mines, subjacent or adjacent, from working and winning the same without making compensation. It makes no difference that the mines and minerals are necessary for the support of the railway. If the company, after notice of intention to work, refuse to make compensation for the mines requisite for the support of their railway, they can only compel the mine-owner to work his mines in a proper manner according to the custom of the district.—*Sprott* v. *Cal. Ry. Co.*, 2 Macq. 449, 28 Jur. 486, applied to a contract entered into before the passing of the statutes now in force, and the doctrine enunciated in it (viz., that if I sell my land for the purpose of a railway being made upon it, I impliedly sell all necessary support, both subjacent and adjacent), is not affected by this decision, which is under statutes creating a new code as to the relations between mine-owners and railway companies compulsorily taking lands. The railway company by s. 77 (71 of Scotch Act), were not to have any mines or minerals under the land purchased by them, but might secure sufficient support to the railway by purchasing it from the owner of the mines, or if they thought it likely that the mines under their railway might not be worked for an indefinite period they might postpone the purchase until the necessity for it arose. That the sec. reserved to the mine-owner all the minerals, however near to the surface, unless the company choose to purchase them, appeared clearly from the exception of the parts necessary to be dug or carried away or used in the construction of the company's works, as those, of course, would be the minerals lying nearest to the surface. But if the company desire to postpone the purchase of the mines until they know that they are to be worked they may do so with perfect safety by the protection afforded them by sec. 78, which requires the owner to give them thirty days' notice of his intention to work the mines. If the company after receiving such notice were willing to make compensation, the owner was not to work the mines. Otherwise he would be at liberty to work the mines, "so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district." But, to guard the railway company under these circumstances against any unfair mode of working the mines to their prejudice, it is provided by sec. 79 (§ 73), that "if any damage or obstruction be occasioned to the railway or works by the improper working of such mines the owner shall make such damage good." Thus the working must be "improper" before the mine-owner is compelled to make such damage good. [Note for reference: Clark *on Partnership*, 497; Fletcher *v.* G. W. Ry. Co., 28 L.J. Ex. 147, 29 L.J. Ex. 253; Dudley Canal Co. *v.* Grazebrook, 1 B and Ad. 59, 8 L.J., K.B, 361.; *Hamilton* v. *Turner*, *&c.*, 1st Div., July 19, 1867; *Wyerley Canal Co.* v. *Bradley*, 7 East. 368; *Midland Ry. Co.* v. *Checkley*, 36 L. J. Ch. 380, *et infra.*]—*G. W. Ry. Co.* v. *Bennett*, Ho. of L. 36 L.J.Q.B., 133.

LANDS CLAUSES CONS. ACT.—*Railways Clauses Act—Injury by Vibration, Smoke and Noise.*—Premises near a railway but not touched by it were depreciated in value by vibration, smoke, and noise, caused by the passage of trains. *Held*, (diss. Channell, B.), rev. dec. of Court of Q.B. 35 L.J.Q.B. 53, *ante* vol. x., p. 141, that the owner was entitled to compensation under secs. 6 and 16 of the Railways' Clauses Act.—*Brand* v. *Hammersmith and City Ry. Co.*, Ex. Ch., 36 L.J., Q. B. 139.

TRUCK ACT.—Sec. 23, of 1 and 2 Will. 4, c. 37, which permits an employer to make stoppages from wages in respect of certain articles, prohibits this "unless the agreement or contract for such stoppage or deduction shall be in writing and signed by such artificer":—*Held*, that the agreement specifying the amounts to be deducted in respect of the several articles need not be in writing. Where an employer deducted from the wages of his artificer 6d. a week for a subscription to a club, in consideration of which the employer, who kept the club funds, was to supply medicine and medical attendance to the subscribers whenever required,—

Held, that this was a "contract to supply" medicine and medical attendance within the meaning of that section, and that the deduction was allowable, though the artificer had never required or received any medicine or medical attendance whatever from the club. *Semble*—that the words of the section permitting an employer to supply "any materials, tools or implements to be by such artificer employed in his trade or occupation, if such artificers be employed in mining," contemplate only an absolute sale, and not a hiring.—*Cutts* v. *Ward*, 36 L.J., Q.B. 161.

ANIMALS—*Evidence of scienter.*—In an action for injury by the bite of a dog it was proved that the wife of the defendant (a milkman) occasionally attended to his business, which was carried on upon premises where he kept the dog, and that a person had gone there four years before and made a complaint to the wife, for the purpose of its being communicated to her husband, of the dog having bitten such person's nephew—*Held*, that there was evidence of the husband's knowledge of the dog's propensity to bite.—*Gladman* v. *Johnson*, 36 L.J., C.P. 153.

PROBATE OR ADMINISTRATION DUTY—*Contingent Reversionary Interest*—55 G. III., c. 184, ss. 38, 141—Where, at the time of taking out probate, no duty is paid in respect of a contingent reversionary interest, which afterwards falls into possession, probate duty must be paid upon its value at the time of falling into possession, and not upon its value at the date of the probate. But if the interest is valued at the time of taking out probate, and duty then paid thereon, such duty is sufficient (see Gwynne on Probate and Adm. p. 28).—*Lord* v. *Colvin*, 36 L.J. Ch., 354.

STOPPAGE IN TRANSITU—*Delivery on board general ship, of which vendee is registered owner*—Goods contracted to be sold, were delivered at Rouen on board a general ship, trading between Rouen and Goole, and ostensibly belonging to a firm of which the vendee was a member, being also the sole registered owner of the ship, and were consigned to the vendee at Goole:—*Held*, rev. dec. of Lord Romilly, M.R., 35 L.J. Ch., 100, *ante*, vol. x. p. 140, that there was a complete delivery of the goods to the consignee at Rouen, and the vendor could not afterwards stop them *in transitu*. [Note for Reference: *Gibson* v. *Carruthers*, 8 M. & W. 328; s.c. 2 Ross, L.C., 255; *Robertson* v. *More*, July 3, 1801, Mor. App. Sale 3; *Baxter* v. *Pierson*, July 8, 1807, Hume 688].—*Schotsmans* v. *Lanc and Yorksh. Ry. Co.*, 36 L.J. Ch., 361.

PARTNERSHIP.—P, a medical practitioner, took M into partnership, in consideration of a premium, P agreeing to give his personal attention to the business for three years, and to introduce M. At the date of contract P was, as he knew, suffering from a mortal disease, which fact was concealed from M. He died a few months after, and a very limited introduction took place. Upon bill by M, Kindersley, V.C., restrained def. from suing on bills given for the unpaid premium, and directed the usual partnership accounts, with a declaration that the plaintiff was entitled to be remitted a reasonable portion of the premium.—*Mackenna* v. *Parkes*, 36 L.J. Ch., 366.

MINES AND MINERALS—*Canal Act.*—A Canal Act reserved minerals to the owners of the soil, gave the Canal Co. power to prevent working within ten yards of the canal, providing for compensation to the owners of minerals in case of such working, but there was no provision as to working at a greater distance:—*Held*, that the Co. were entitled to restrain the working of minerals so as to endanger the canal at a greater distance than ten yards, but only upon making compensation in manner provided by the act as to the less distance. Stone got by quarrying held to be mineral within the meaning of the act.—*Midland Ry. Co.* v. *Checkley*, 36 L.J. Ch., 380.

RAILWAY—*Agreement—Time of Essence of the Contract—Award.*—A Ry. Co. agreed to make such accommodation works as A.B. should notify within one month after possession given to the Co. A.B. and the Co.'s engineer met and discussed the necessary works, and a mem. was made specifying certain works. Discussions as to these were protracted beyond the month. Two months after

the month had expired A.B. made his award, which provided for a cattle-arch not previously mentioned. The Co.'s solrs., not being fully informed as to the date of the award, took it up, and paid arbitrator's charges:—*Held*, that the condition as to time was not waived as to works not previously mentioned, for a waiver must be an intentional act with knowledge, and it is incumbent on any party insisting on a verbal agreement, in substitution of a written contract, to shew that both parties understood the terms of the substituted agreement:—*Held*, also, that as parties had left matters to the discretion of A.B., the Court had no power to substitute its own discretion for that of A.B., so as to order the construction of works, though such might appear to be necessary and proper; and, *semble* (by Chelmsford, C.), that taking up an award known to have been made after the limited time had expired, is not an admission that the arbitrator's authority has not expired.—*Earl of Darnley* v. *London, Chatham, and Dover Ry. Co.* (House of Lords), 36 L.J. Ch., 404.

MARINE INSURANCE.—A. having chartered his vessel for a voyage, insured the chartered freight by a policy containing a warranty against particular average and the usual suing and labouring clause. The ship, after sailing, was obliged to put into an intermediate port, where she became a total wreck. But the goods were landed, warehoused, and sent on at a less freight, and the owners of the cargo paid the whole agreed freight:—*Held*, that as no freight, *pro rata itineris*, could by the law of England be claimed, there was a total loss of freight at the intermediate port, unless it could be averted by such forwarding; that such forwarding was a particular charge within the suing and labouring clause, and did not convert the total into a partial loss so as to bring the case within the warranty against particular average; and that A. was therefore entitled to recover the expense of such forwarding from the insurer for whose benefit it was really incurred. —*Kidston* v. *Empire Marine Ins. Co.*, Ex. Ch., 36 L.J.C.P., 156.

CARRIERS BY RAILWAY—*Railway and Canal Traffic Act.*—A consignment note signed by the party sending meat by a railway co. contained a condition as to meat and other perishable articles, that the company would not be responsible "for any damage to any such articles, on the ground of loss of market, provided the same was delivered within a reasonable time after the arrival thereof at the station from whence delivery was made":—*Held*, that the condition was reasonable within the meaning of 17 & 18 Vict. c. 31, s. 7.—*Lord* v. *Midland Rail. Co.*, 36 L.J.C.P., 170.

RAILWAY.—*Latent defect in carriage.*—A ry. co. as common carriers of passengers do not by their contract to carry impliedly warrant that their carriages are roadworthy, and though they are liable for negligence, yet they are not liable to a passenger for an injury to him caused by a hidden defect in their carriage, which no amount of care or skill, either in the manufacture, purchase, or use could have discovered. Per *Mellor, J.*, and *Lush, J., diss. Blackburn, J.* And *contra*, per *Blackburn, J.*—A railway company, as such carriers, though their liability is not that of an insurer, are bound at their peril to supply their passengers with carriages in fact reasonably sufficient for the journey, or be responsible for any damage resulting from a defect though hidden. [Note for reference: Ante, p. 315; Coggs *v.* Barnard, 1 Sm. L. C. 189, 6th ed.; Riley *v.* Horne, 5 Bing. 220: Story on Bailments, s. 492, 601.]—*Redhead* v. *Midland Ry. Co.*,36 L. J. 2 B. 181.

COMPANY—*transfer.*—Sec. 16 of Companies' Clauses Act, 1845, enacts that "no shareholder shall be entitled to transfer any share after any call shall have been made in respect thereof, until he shall have paid such call, nor until he shall have paid all calls for the time being due on every share held by him." H, holding certain L.25 shares in a ry. co., had allotted to him, in respect thereof, 66 new "preference L.10 shares," created for raising additional capital. Calls were made in respect of both sets of shares, and those made upon the L.10 shares held by H were duly paid, but some of those made upon the L.25 shares he never paid. The L.10 shares were subsequently converted into stock, and sold by H. to the ptff. The company refused to register the transfer, on the ground that H. had

not paid the calls due upon his original L.25 shares. —*Held*, aff. judg. of Q. B., that no calls being due in respect of the L.10 shares, H. was entitled to transfer the stock into which they had been converted to the plaintiff, and that the co. were bound to register the transfer when required.—*Hubbersty* v. *Manch., Sheff., & Lincolnsh. Ry. Co.* (Ex. Ch.) 36 L. J. Q. B. 198.

CARRIER—*delay: hotel expenses.*—A commercial traveller sent his traveller's case of goods by luggage train from O. to L., without any intimation respecting it of any kind; there was a delay of two days, and he claimed his hotel expenses for that time, on the ground of his not being able to conduct his business:—*Held*, that he was not entitled to recover them. *Woodger* v. *the Great Western Rail. Co.*, 36 L. J. C. P. 177.

SHIPPING—*Bill of Lading*—Under a bill of lading in the ordinary form, damage done by rats is not within the ordinary exception of dangers of the sea and navigation, and the shipowner is liable though he has taken every precaution against them. Laveroni *v.* Drury, 8 Ex. 166, confirmed. *Kay* v. *Wheeler*, Ex. Ch. 36 L. J. C. P. 180.

NEGLIGENCE—*Injury to person on premises by invitation.*—Df. agreed with D for the setting up of gas-regulators in his sugar-refinery, which were not to remain unless a certain saving was effected. In order to test this it was necessary to examine the burners, and D 's manager and plt., as his servant, went to the refinery for that purpose. In the refinery there was a shaft for raising and lowering sugar, necessary, usual, and proper for the business. This was unfenced, though when out of use it might have been fenced round. Plt. was warned by D.'s manager that the place was dangerous and lights not allowed, and that he should keep by a man who would have a light; but having left a tool he went back for it, and in returning to the man with the light fell through the shaft without any fault on his part. *Held*, that where a person resorts to a building in the course of business on the express or implied invitation of the occupier, and uses reasonable care, the occupier is bound to use reasonable care to prevent damage from unusual danger which he ought to know; that where there is evidence of neglect, it is a question for the jury; and that in this case there was evidence for the jury that plt. was on deft.'s premises on business by his tacit invitation, that the shaft was an unusual danger known to deft., and that damage accrued to plt. through deft. and his servants not using sufficient means to warn him of it. *Indermaur* v. *Dames*, 35 L. J. C. P. 184; Ex. Ch., 36 L. J. C. P. 181.

SHIPPING.—A charter-party agreed that the cargo should be loaded and discharged with all dispatch, and contained the clause: "The charterer's liability on this charter to cease when the cargo is shipped (provided the same is worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead freight, and demurrage, which he or owner shall be bound to exercise." Charterers having shipped a cargo worth the freight on arrival at the port of discharge,—*Held*, in an action on the charter-party, that they were protected by the clause from liability to the shipowner for not loading in due time according to the charter. *Bannister* v. *Breslauer*, 36 L. J. C. P. 195.

SUCCESSION DUTY ACT, 1853, s. 21.—The power of a tenant in tail in possession to enlarge his estate so that he shall become competent to dispose by will of a continuing interest in the entailed property is incident to the estate which such tenant takes under the instrument creating the entail; and if he exercises the power, he must be treated for the purpose of succession-duty as if he had succeeded to such enlarged estate; and any instalments of succession-duty that may be unpaid at his decease will become a continuing charge on the property in the hands of his successor or other owner thereof for the time being. *Lilford* v. *Attorney-General* (House of Lords), 36 L. J. Ex. 116.

RAILWAY—*Lloyd's bond: illegality.*—A ry. co. being sued by the assignee of a Lloyd's bond given by them, compromised the action before judgment by assigning their rolling stock to secure the money advanced. Some of the rolling stock was afterwards taken in execution by another creditor.—*Held*, in an interpleader

issue between the two creditors, that evidence ought not to be admitted to show that the bond was illegal, the assignee having taken it without notice of any illegality; and that, whether the assignment of the rolling stock was *ultra vires* and illegal or not, still, as it was made in lieu of judgment, its legality was not in question on this issue, and the assignee was entitled to the rolling stock as against the execution creditor. *Blackmore* v. *Yates*, 36 L. J. Ex. 121.

CONTRACT—*Blasphemy—Illegality*—Lectures in support of the propositions that "the character of Christ is defective and his teachings misleading," and that "the Bible is no more inspired than any other book," are blasphemous and illegal, and the proprietor of public rooms, who, in ignorance of the precise subjects of the lectures, contracts to let such rooms to the plt. for the delivery of certain lectures may, upon subseqnently ascertaining the nature of them to be as above stated, avoid the contract, and refuse to permit plt. the use of the rooms.—A deft.'s motive for avoiding the contract under such circumstances is immaterial, nor is he bound to give any reason at the time for declining to fulfil his contract, but may afterwards justify himself on any ground that occurs to him (*Spotswood* v. *Barrow*, 5 Ex. 110; 19 L. J., N. S. 226, Ex.)—Per *Bramwell*, *B.*: Such lectures are unlawful, as being contrary to the stat. 9 & 10 Will. III., c. 32. *Cowan* v. *Milbourn*, 36 L. J., Ex. 124; 16 Law Times R., N.S. 290.

COPYRIGHT—*Trade mark*—5 & 6 Vict. c. 45.—No copyright can be acquired by registration at Stationer's Hall until publication of the work registered.—*Semble*, there can be no copyright in a single word, even though it be the name of a book. Mere public declaration of intention to publish a magazine or other manufactured article, bearing a particular name or mark, even coupled with expenditure in connection therewith, creates no right to exclusive use of such name or mark as a trade-mark.—*Maxwell* v. *Hogg* and *Hogg* v. *Maxwell* (L. Justices) 36 L. J., Ch. 493.

RAILWAY—*Compensation.*—The lessee of premises which a Ry. Co. had given notice of intention to take, claimed a right of future renewal of his lease, which was for 61 years from 1829. The Co. who disputed this right, took possession, agreeing to pay for lessee's interest in her present term, without prejudice to her claim in respect of the future right. Upon bill filed by lessee to establish her future right—*Held*, per Wood, V.C., that as the Lands Clauses Act contained no machinery for settling such a question, and the plaintiff had no remedy elsewhere, the Court had jurisdiction. [Note for Reference: *Brandon* v. *Brandon*, 2 Dr. and Sm., 305, 34 L.J. Ch. 333.] *Bogg* v. *Midland Ry. Co.*, 36 L.J. Ch. 440.

CONTRIBUTORY—*Limited Company: Rectification of Register.*—A shareholder in a limited company sold his shares, and the purchaser re-sold them. The vendor executed transfers, first, to the purchaser, and, secondly, to a nominee of the sub purchaser; but, owing to disputes between the purchaser and sub-purchaser neither transfer was registered. When winding-up order was subsequently made, the original vendor remained on the register, and he was placed on the list of contributories. An order by the M.R., removing the name of the original vendor, and substituting that of the sub-purchaser, discharged by *Lords Justices*,—by *Turner*, L.J., on the ground that the jurisdiction to rectify the register depended on the Companies' Act, 1862, s. 35, and being discretionary, ought under the circumstances, not to be exercised; and, by *Cairns*, L.J., because, the company being in no default in the matter, the jurisdiction could not be exercised. Per *Turner*, L.J. The jurisdiction under sec. 35, to rectify errors in the register, is generally applicable in all cases of error, whether occasioned by default of the company or otherwise. Per *Cairns*, L.J.—The object of sec. 35 is to provide for the correction of errors in the register caused by the default of the company, and of such errors alone. *In re London, Hamburgh and Continental Exchange Bank (Lim.). (Ex parte Ward).* 36 L.J. Ch. 462.

CONTRIBUTORY.—*Prospectus and Memorandum of Association.*—Where a shareholder takes shares on the faith of statements in a prospectus, he is bound within

a reasonable time to ascertain the contents of the memorandum and articles of association, and immediately to repudiate his liability if he considers that there is such a variance between them as to entitle him to withdraw from his contract. *In re the Madrid Bank.* (*Wilkinson's case.*) 36 L.J. Ch. 189.

CONTRIBUTORY—*Prospectus, and Memorandum, and Articles of Association Variation: Delay.*—A. applied for shares on Sept. 4, 1865, in a limited compny, which was not incorporated, but had issued a prospectus. The co. was subsequently incorporated, its memorandum and articles of association, which extended the objects of the company and the powers of the directors beyond what the prospectus had specified, being registered on Sept. 11. The shares were allotted to A. on 7th Oct. He paid a deposit on application, and a further sum on allotment. He first saw the mem. and articles of association in the middle of May, 1866, and on Sept. 27 he gave notice to the co. that, on the ground of the variations, he repudiated the shares:—*Held*, by *Lords Justices* (aff. dec. of *Wood, V.C.*), that A, by his delay after knowledge of the facts, had waived any right of repudiation which he might have possessed. And per *Cairns*, L.J.—A person applying, on the faith of a prospectus, for shares in a limited company, and by his application authorizing the entry of his name on the register as a shareholder, is not at liberty to trust to the prospectus, but is bound to examine the mem. of association; and, after the lapse of a reasonable time from registration of the mem., will be held to have waived such examination. *In re Cachar Co.* (*Lim.*) (*Ex parte Lawrence.*) 36 L.J. Ch. 490.

CONTRIBUTORY—*Variation: Delay.*—K. applied for shares on April 18 1865, the company not being then registered. On April 29 the shares were allotted. He paid the money due upon allotment on May 11. He also paid a call in April, 1866. In consequence of a variation between the prospectus and mem. of association, he might have repudiated the shares. He stated that he was ignorant of such variation until after April 25 1866. He applied on July 18 1866, to have his name removed from the register. *Held*, that, on the grounnd of delay, he was not entitled to such relief. *In re Russian Vyksounsky Iron Works Co.* (*Lim.*) (*Kincaid's Case.*) 36 L.J. Ch. 499.

CONTRIBUTORY—*Companies' Act*, 1862, *s.* 23.—A person signed the mem. of association in respect of ten shares, and was one of original provisional directors. He was never treated as a shareholder, and retired from the direction when permanent directors were appointed. No shares were allotted to him; all the shares were, however, not alloted when the company was ordered to be wound up. *Held*, he was rightly placed upon the list of contributories, in accordance with sec. 23. *In re London, Hamburgh and Continental Exchange Bank* (*Lim.*) (*Evan's case.*) 36 L.J. Ch. 501.

PRODUCTION OF DOCUMENTS—*Property in Letters.*—The receiver of a letter is the owner of it, and may use it for all lawful purposes, subject only to the power of the writer to restrain publication. *Hopkinson* v. *Lord Burghley.* 36 L.J. Ch. 504.

TRADEMARK.—The Court will not restrain the use of a label on the ground of its general resemblance to the trade-mark of another manufacturer, if it is different in the points which a customer would look at in order to see whose manufacture he was purchasing. *Blackwell* v. *Crabb.* 36 L.J. Ch. 504.

WINDING-UP.—The Court has power under sec. 199 of Companies' Act, 1862, to wind up any company incorporated by special act of parliament other than a railway company. *In re Proprietors of the Wey and Arun Junction Canal.* 36 L.J. Ch. 509.

WINDING-UP.—*Interest on Arrears of Call.*—A contributory received from the official liquidators formal notice of a call, with notification that interest at £5 per cent. would be charged if the call were not paid on or before the day appointed. The call being in arrear,—*Held*, that interest must be paid at the rate named as from the time at which the call became payable, both on the ground that there

was a special provision for interest on calls in arrear in the articles of association, which were held to be still in force to this effect, and because the call made was a specialty debt, and as such fell within 3 and 4 Wm. IV. c. 42 s. 28.

NEGLIGENCE—*Carriers by Railway.*—By 7 & 8 Vict. c. 85, s. 6, children under three years of age accompanying passengers by parliamentary trains are to be taken without any charge, and children of three years and upwards, but under twelve at half-fare. Plaintiff, a child between three and four years of age, was travelling by railway with its mother, who took a ticket for herself, but paid nothing for the child, though without fraudulent intention,—*Held*, the company might be sued for negligently carrying the child. Per *Cockburn, C.J.*, *Shee, J.*, and *Lush, J.*, that there was a contract to carry both mother and child, and that the mistake as to age was no answer to an action for breach of this contract. Per *Blackburn, J.*, that, apart from any contract, the company were liable for the injury to the child while it was lawfully in one of their carriages. [*Vide supra*, p. 320.] *Austin* v. *the Great Western Rail. Co.* 36 L.J., Q.B., 201.

LANDS CLAUSES ACT, 1845.—*Railways Clauses, 1845: Compensation: Loss of Trade.*—Loss of trade by the obstruction of a highway during the execution of the works of a ry. co. is not an "injurious affecting" of the tradesman's interest in his premises which entitles him to compensation under sec. 68 of the Lands Clauses Act, 1845, or under secs. 6 or 16 of the Railways Clauses Act, 1845. A ry. co. placed a temporary bridge over a highway during the construction of their works, whereby for about 20 months access to a public-house was made more difficult, passengers were deterred from passing that way, and loss of trade ensued to the publichouse:—*Held*, per *Chelmsford*, C., and *L. Cranworth*, (*L. Westbury* diss.), compensation could not be claimed for this. Per *Chelmsford*, C., sec. 68 of 8 Vict. c. 18, and sec. 6 of 8 Vict. c. 20, provide for damage of a permanent, and not merely of a temporary nature, and sec. 16 of 8 Vict. c. 20, which provides for damage of a temporary nature, contemplates only a direct and not a merely consequential damage; and per *L. Cranworth*, compensation can only be claimed where damage has been done to the structure of the property, or where the plaintiff has suffered some special damage differing not merely in degree from that which the rest of the public has sustained.—Judgment of Q. B. rev., and that of Exch. Cham. (34 L. J. 257, *ante* vol. x., p. 47) affirmed. Per *Chelmsford, C.*, "It was most desirable, as Erle, C. J., said in '*Cameron* v. *Charing-cross Railway Company*' (16 C. B. N. S. 430; 23 L. J. C. P. 313), 'that if possible some definite and precise rule should be laid down as to the true limits within which claims against railway and other companies for compensation in respect of damage caused by their works are to be confined.' It appeared to be a hopeless task to attempt to reconcile the cases upon the subject, and therefore he must endeavour, by an examination of them, to determine which were most in accordance with principle. The criterion of a party's right to damages under the clauses of the Railway Companies Acts, upon which this case depended, was correctly stated by Lord Campbell 'in re *Penny* v. *South Eastern-Railway Company*' (7 E. B., 660; 26 L. J. Q. B., 225), and, in his words, 'unless the particular injury would have been actionable before the company had acquired their statutory powers, it is not an injury for which compensation can be claimed.' At the same time, the observation of Lord Cranworth in '*The Caledonian Railway Company* v. *Ogilvy*' (2 *Macq.* 235), must not be lost sight of, that 'it does not follow that a party could have a right to compensation in some cases in which, if the Act of Parliament had not passed, there might have been not only an indictment, but a right of action.' In the first place, therefore, it was material to inquire whether plaintiff in error could have maintained an action against the Co. for the alleged consequences of their acts if they had been done without the authority of Parliament. As far as he had been able to examine the cases, in all of them except two, in which an individual had been allowed to maintain an action for damages which he had specially sustained by the obstruction of a highway, the injury complained of had been personal to himself, either immediately or by immediate consequence. The two excepted cases were '*Baker* v. *Moore*,' mentioned by Gould, J., in '*Iveson* v.

Moore' (1 Lord Rayn., 491), and '*Wilks* v. *Hungerford-market Company* (2 Bing. N. C. 281). In his opinion, however, the damage in those was too remote. In the present case, also, the damage, which was the foundation of the claim to compensation, was too remote. He might have been content to rest his judgment in favour of the defendants in error upon this ground alone; but the diversity of opinion which had prevailed as to the application of the clauses in question rendered it almost imperative upon the House to pronounce an authoritative final decision upon the whole case. His Lordship then proceeded to examine a great number of cases bearing upon the question. '*Senior* v. *Metropolitan Railway Company*' (2 H. and C. 258; 32 L. J. Ex. 225) was the only direct authority against the judgment of the Exch. Cham. under consideration, and there the judgments were not very satisfactory; while the decision in '*Rex* v. *The London Dock Company*' (5 A. and E. 163) was an equally strong authority the other way. . . . . A critical examination of the words of sec. 16 of the Railway Clauses Act led to the conclusion that compensation for remote consequences resulting from a company's works was not intended. . . . . Upon a review of all the authorities, and upon a consideration of the section of the statute relating to this subject, he had satisfied himself that the temporary obstruction of the highway which prevented the free passage of persons along it, and so incidentally interrupted the resort to the plaintiff's public house, would not have been the subject of an action at common law, as an individual injury sustained by the plaintiff in error, distinguishing his case from the rest of the public; that, therefore, he had failed in bringing himself within the general principle upon which a claim to compensation under the Acts in question had been determined to depend; that upon the construction of the clause upon which his claim is rested, sec. 16 of the Railway Clauses Act, and sec. 68 of the Lands Clauses Act were both inapplicable, as his damage arose from the temporary operations of the company, and not from their permanent works; and that upon sec. 16 of the Railway Clauses Act, which did apply to his case, the damage was not of such a nature as so entitle him to compensation; the interruption of persons who would have resorted to his house but for the obstruction of the highway being a consequential injury too remote to be within the provision of that section. [Cf. Cal. Ry. Co. v. Ogilvy, 2 Macq. 229; Gattke's Case, 3 Macn. and G. 155.]—*Rickett* v. *Metropolitan Ry. Co.*, 36 L. J. Q. B. 205.

PRINCIPAL AND SURETY—*Bond for Performance of Office.*—Declaration on a bond reciting that S. was in March 1852 appointed collector of the poor-rates of the parish of A., and that he was also in March 1866 appointed collector of sewers rates and general rates under the Metropolis Local Management Act 1865, and defts. had consented to become sureties for him. The condition of the bond was that if S. should well and truly perform the duties of the said offices, and account for the moneys collected in the execution of his office of collector, the bond should be void. Breach, that S. was continued in the said offices, and collected and received sums of money, but did not pay certain monies he had collected to the churchwardens, &c. The defts. pleaded that the bond was executed before the passing of the Metropolis Local Management Act Amendment Acts, and that the duties of S. in his office of collector of the said rates were increased and varied by the said Acts, that the said S. was appointed collector of the main drainage rates under the said Acts, and that by those Acts he was bound as collector of the sewers rate to collect sums of money for defraying the expenses of the Metropolitan Board and other moneys, and that the risk of the sureties was varied and increased:—*Held* (aff. judgment of the Court of C. P., 35 L. J., C. P., 154, on demurrer), that even if the duties as collector of sewers rates were altered, the poor-rate remained the same, and that as the breach was large enough to cover both, the plea was no answer to the action:—*Held*, also, that there was no substantial alteration in the office of collector of sewers rates, and that the most that could be said was, that S. had been appointed to a new and distinct office, which would not affect the liability of the sureties for the other rates which were unaltered. [Note for Reference, Leith Bank v. Bell, 8 S. 721, 5 W. and S. 703; Bonar v. M'Donald, 9 D. 1537, 7 Bell's App. 379.] *Skillett* v. *Fletcher* (Exch. Cham.), 36 L.J., C.P., 206; 16 L. Times, N.S., 426.

THE

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THE LEGISLATION OF 1867.

SOME of the Acts of the Parliament of 1867 are measures of great importance. The Public Health Act, the Debts Recovery Act, and the Hypothec Act are, however, all that the Government have accomplished out of the seven Scotch bills which they announced at the beginning of the year. We begin with the bills which are exclusively Scotch, and leave out of view in the present article the Debts Recovery and the Public Health Acts, which are separately discussed. Cap. 17 of the late session is the first Act since 1672 regulating the court and office of the Lyon King at Arms, and the emoluments of himself and his officers. It is now provided that this functionary, who has hitherto been an ornamental personage, generally a nobleman, shall discharge his duties personally, and not by deputy. The Act also fixes salaries, fees, and hours of attendance at the Lyon Office.

Cap. 28 extends the Labouring Classes Dwellings Act of 1866 to Scotland, and authorises the Public Works Loan Commissioners to make advances upon mortgage to local authorities, railway, harbour, and other companies, and to proprietors of land in Scotland, for the erection, alteration, and adaptation of dwellings for the labouring classes, to be repaid with interest at not less than 4 per cent. within forty years.

The *Scotsman* lately pointed out that "the subject of Public Libraries is one which well-meaning but muddle-headed legislators have shown a curious propensity to cobble at. An Act applicable to both England and Scotland was passed in 1853, and repealed so far as it related to Scotland in 1854, when a special Act was substituted applicable to Scotland alone. An exclusively English Act was passed in 1855. Last year, there was an Act amending both the English Act of 1855 and the Scotch one of 1854, but, of course, lead-

ing to some confusion from the jumbling up together of the patches intended for two different statutes." 30 & 31 Vict. c. 37, consolidates the provisions of the Acts of 1854 and 1855 in one exclusively Scotch statute, which may be adopted by the householders of any royal or parliamentary burgh, burgh of barony or regality, or other populous place where any local or general Police Act is in force, or of any parish, by a resolution of the majority of those present at a meeting duly called. Expenses are to be paid out of the police rate, or a rate not exceeding a penny in the pound of yearly rent levied along with the police rate in burghs and districts, and out of a similar rate levied along with the poor's rate in parishes. The rate is to be levied by the Council or Police Board in burghs and districts, and the Parochial Board in parishes. The library is to be managed by a committee, one half being members of the Council or Board, and one half being chosen by the Council or Board from the householders who are not members. The word "householder" is defined to "mean in burghs all persons entitled to vote in the election of members of Parliament." Elsewhere it is to mean ratepayers.

Cap. 42 gives effect to the recommendations of the Royal Commission on the Law of Landlords' Hypothec. It must be said for the measure that it is as little adverse to the prejudices of landlords as might be. The landlord's hypothec ceases and determines in two cases—(1) Where agricultural produce has been *bona fide* purchased, delivered, and removed from a farm, and the price has been paid; and (2) where it has been sold by auction after seven days' notice to the landlord, without sequestration being obtained and registered in the register provided by the Act. The endurance of the hypothec is limited to three months after the conventional or legal term at which the last portion of the year's rent is payable; and declaratory enactments are added—(1) That the stock of a third party taken in to graze upon a farm shall be subject to the hypothec to the full extent of the stipulated payment so long as any portion of the sheep, cattle, or other live stock shall remain on the farm, and, after removal from the farm, so long as any part of the payment remains unpaid; and (2) that household furniture, agricultural implements, imported manure, lime, drain-tiles, feeding stuffs, or other material not the produce of the farm, and not incorporated with the soil or consumed, shall not be included in any sequestration for rent except where such manure or other material has been brought upon the farm in fulfilment of any specific obligation imposed by the lease.

Two Acts of the session, 30 and 31 Vict., amend the law relating to Railway Companies. Cap. 126 is identical in substance with an English Act on the same subject. The bill was originally intended to relieve the public, and railway companies themselves, from the inconveniences of insolvency. It first prevents creditors from using diligence against the moveable property of the company, and thus carrying off a necessary part of the undertaking. A creditor can no longer attach the rolling stock of a railway company, but his only

remedy is, in future, an application to the Court for the appointment of a judicial factor, who shall distribute among the creditors any surplus revenue that may remain after paying working expenses. As originally passed by the House of Commons, the bill provided, further, two alternative ways in which creditors might obtain a settlement of their claims,—(1) an arrangement between them and the company; and, (2) after the judicial factory had endured for a year without any arrangement being made, a compulsory sale of the undertaking. The provision for compulsory sale was struck out by the House of Lords. Thus there remain only the clauses authorising the Court, on the application of the company, where it is unable to meet its engagements with its creditors, to approve a scheme of arrangement. Notice of this application in the *Gazette* operates as a stay of all diligence. The scheme must be assented to in writing within three months after the presentation of the petition for confirmation, (1) by three-fourths in value of the debenture-holders; (2) by the same proportion of persons in right of any annual payment charged on the receipts of the company, in consideration of the purchase of the undertaking of another company; and (3) by three-fourths in value of each class of guaranteed or preference shareholders of the company. It must also be assented to by the ordinary shareholders at an extraordinary general meeting, specially called for the purpose. The assent of creditors whose interest is not affected by the scheme is not required. The scheme when confirmed shall be extracted; and the extracted scheme has the effect of an Act of Parliament. It may be doubtful how far the Act will work without the provision for compulsory sale, which might be regarded as an essential part of it. The power to make an arrangement also authorises, in fact, the creation of pre-preference shares without the unanimous consent of the shareholders and debenture holders; but the numerous consents required, and the power of the Court to refuse to confirm a scheme may perhaps prevent practical evil in this respect.

Sec. 30 imposes upon auditors the duty of preventing dividends from being paid out of capital. The Act also extends the operation of the Abandonment of Railways Act of 1850 to all companies authorised to make railways before the session of 1867; and the winding up of abandoned railways is to be under the Act of 1862 instead of that of 1848.

Another Act (c. 80) makes certain alterations in the method of valuing railways by the Assessor of Railways and Canals, amending the Valuation of Lands Acts. The whole subject of the valuation of lands is to be treated of with some fulness in the forthcoming new edition of Sheriff Smith's Treatise on the Poor Law; in reviewing which we shall have occasion to refer to this statute.

The Act to facilitate the Administration of Trusts confers on all trustees absolutely, where such acts are not at variance with the terms or purposes of the trust-deed under which they act, power to

appoint and pay law agents and factors, to discharge trustees who have resigned, to grant leases, to uplift and discharge debts, to compromise claims, and to pay debts without requiring creditors to constitute them. Clauses conferring these powers may therefore be omitted in future trust-deeds. The Court of Session, or the Lord Ordinary in the Bill Chamber in vacation, may also authorise trustees to sell, feu, excamb, or let on long lease, the trust estate, to borrow money on the security of it; and these powers may also be conferred by the beneficiaries, if they are of age, by deed of consent. Powers of sale may be exercised either by private bargain or public roup, unless otherwise directed; funds may be invested in the public funds or Bank of England stock; and money may be advanced from capital for the maintenance and education of beneficiaries. The Act also provides for the discharge by the Court on summary petition of a trustee resigning who cannot otherwise obtain a discharge. It gives a form of resignation, regulates the resignation of a sole trustee and the assumption of new trustees, or their appointment by the Court when they cannot be assumed under any trust-deed. It also enables a beneficiary under a lapsed trust to complete his title to property under the authority of the Court. The powers of the Court under the Act are to be exercised by any Lord Ordinary, and the powers conferred by the Act on trustees and on the Court may be expressly negatived, varied, or limited by any trust-deed.

THE MASTER AND SERVANT ACT, 1867.

The seeming inequality in the former law of Master and Servant, as regulated by Geo. IV. c. 34, and other statutes, has been remedied by 30 & 31 Vict. c. 141. It may be questioned whether the harshness which was complained of was more than an apparent one, but at all events it had become incompatible with the ideas of the age that there should be a criminal jurisdiction under the sanction of imprisonment against a workman for breach of his contract of service, while the remedy against the master under the same contract was merely an order for payment of wages enforced by a warrant for sale. The leading principle of the new Act, which proceeds on the recommendations of Lord Elcho's Committee, is that the remedy against each party shall be, in words at least, the same. The third section of the Act limits the scope of the Act to such contracts of service as are within the meaning of the former Acts on similar subjects, which are enumerated in Sched. I. The Act changes the manner of determining questions between employers and certain classes of servants, but not the questions that may be determined. Only if (1) "the contract of service," (2) "the employer and employed, and (3)

"the case, matter, or thing arising under or relating to such contract," and upon which the Justices or Sheriff* are required to adjudicate, be such as they might have adjudicated upon if the new Act had not been passed, does the case come within their jurisdiction under the new Act.

The contract, the parties, and the subject matter of the dispute being such as the Justices of Peace might previously have entertained, the Sheriff or Justices may now (sec. 4) proceed to ascertain (1) if either party has neglected or refused to fulfil the contract; (2) if the employed has neglected or refused to enter to or commence his service according to the contract; (3) if the employed has absented himself from the service; (4) if any question, dispute, or difference, has arisen as to the rights or liabilities of either party; or, (5) if there have been any misusage, misdemeanour, misconduct, ill-treatment, or injury to the person or property of either party under such contract of service. We may observe that a question was raised in some London Police Courts, with special reference to this sec. and sec. 9, whether the Act did not take away the jurisdiction of Justices, under 20 Geo. II. c. 19, to order payment of wages in certain cases. That Act is seldom or never used in Scotland, (Barclay's Dig. p. 639), but its summary remedy may sometimes be convenient. Several magistrates of police in London have, after consultation, come to the conclusion that there is no power under the new Act to order payment of wages, and "that only such provisions of the old Acts are annulled as are repugnant to the new one." (*Times*, September 25 and 26). †

A party aggrieved in any of the respects above enumerated may make a complaint in the form supplied in the Schedule to *a Justice*

* By the interpretation clause the word "Magistrate" in the Act does not apply to Scotland; and it is to be observed that this whole class of cases which was formerly confined to the Justices of Peace is now competent before the Sheriff.

† This view is confirmed by a private letter written by Mr Oke, a high authority on such questions, which is published in the *Law Times*, and which, as it throws light on the history and prospects of this statute, we here annex:—

"I am now preparing a new edition of my 'Formulist,' which will bring the law down to the end of the last session, and include forms under the Master and Servants Act, 1867. With reference to the mooted question whether the jurisdiction of justices to order payment of wages is 'taken away' by the 30th and 31st Vict. c. 141, an opinion to that effect having been, as appears by the newspapers, very hastily expressed by some of the metropolitan police magistrates (but in which I observe you do not, nor can I concur), I am desirous to state for your information, as well as that of others, that that was not, as I know, the intention of those who printed the Bill in Parliament, if not of the Legislature, for the measure was intended solely as a substitute for the punishment by imprisonment, and for misbehaviour and other breaches of the contract by servants, and to give to the servant the same remedy for such breaches as against the master.

I think you will find on a careful perusal of the provisions of the Act, especially of sect. 4, coupled with the express and limited terms of adjudication authorised by sect. 9, to be made by justices, that the Act goes no further than this; and sect. 3 confines it to these cases strictly. I may say further, in corroboration of this view, that when the Bill came to the House of Lords I was instructed by the solicitors for the promoters to see if its provisions were workable, and to revise it. I found it in such a state of confusion that, with the exception of some immaterial alterations and addi-

or Sheriff, who shall cite the party complained against to appear before *two Justices* or the Sheriff at a time not less than two or more than eight days from the date of the summons or citation. This must be served (sec. 6) not less than two days before the time appointed. A warrant for apprehension of the person complained against may be issued when he neglects or refuses to appear, and after due proof on oath of the service of the summons; the Justices or Sheriff having it would seem no power to proceed *ex parte* on the defender's failure to appear.

In case of an intention to abscond the justice or sheriff may (sec. 8), after a complaint has been laid, issue a citation requiring the defender within twenty-four hours to give bail for his appearance to answer to the complaint, and if he fail to appear and give bail a warrant may issue for his apprehension, when he may be detained till he find bail. The Act is silent as to the manner in which it may be made to appear to the magistrate that the defender intends to abscond; but Mr. Saunders, the well-known author of "The Practice of Magistrates' Courts," recommends that in a matter so much at variance with the ordinary course of judicial proceeding no such application should be granted unless facts showing such intention be stated on oath and be reduced to writing. In Scotland the analogy of the procedure against debtors *in meditatione fugae* may afford some guidance. It will probably be the safest course to require the application to be made by written petition stating the grounds of the applicant's belief, and supported by his oath. This seems also to have been the practice in the somewhat similar procedure (now seldom or never resorted to) for enforcing the attendance of an absconding witness required for a criminal trial (Hume, ii., 375, Macdonald, 499). The further question arises, however, when the defender appears, either in obedience to the citation under sec. 8 or in custody under the warrant, whether he is entitled to lead proof. In Scotch practice, where a person has been apprehended as *in fuga* and is brought up for examination, both parties are not unfrequently allowed

tions in sects. 4, 9, and 14, the Bill had to be redrawn in its details and procedure, which was accordingly done by Mr F. S. Reilly and myself before it went into committee in the Lords, by whom the altered Bill was adopted, and as it now appears as an Act. I suggested a clause giving justices a general power to order payment of wages to all servants within the Acts; but, upon consideration, and especially as the Act was experimental and limited in duration, it was deemed advisable to conform the Bill to the object I have mentioned, for which it was originally introduced, and so the recovery of wages was purposely kept out of the Act. It is, however, erroneous to say that the justices' jurisdiction is ousted by this Act of 30 & 31 Vict. c. 141; there is no repealing clause in it, and it is a mere partial substitution of remedies; and, as the preamble states, is only "to alter in some respects" the older Acts. If it had been intended to repeal or alter the justices' power in this respect it would have been done definitely and specifically by Mr Reilly or myself; but as that part of the subject is in no way touched by the present Act, wages are, in my opinion, still recoverable under the old Acts. There was not time to prepare and pass a consolidation Act in the last session (the Bill did not reach me till July), which I recommended when the measure came into my hands; but, with a view to that end at an early period, the Act is only to last for a year and a session."

(see Bell's Com. ii., 561, *Davies* v. *Duncan*, Feb. 9, 1861, 23 D. 532) instantaneously or at a very brief interval to adduce evidence, and there does not seem to be any very cogent reason upon general grounds why this practice should not be admissible under the statute. Mr Saunders, however, comes with regret to the conclusion that under this section "the justice will have no functions upon the appearance of the defendant to enter into the question of whether or not he really intended to abscond, but that having so far satisfied himself of the fact as to be induced to issue his summons it will be his duty on the appearance of the defendant, without hearing any denial from him, to bind him over, or, in default, to detain him in safe custody until the hearing of the information or until he sooner finds such security." The reasons for this opinion are the absence of any provision for the defendant being allowed to controvert the allegations upon which he was arrested, such as occurs in the Absconding Debtors Arrest Act, 14 and 15 Vict., c. 52, which establishes a form of proceeding corresponding to our *meditatio fugae* warrant; and the analogy of an application for sureties to keep the peace, in which the party against whom the application is made is not allowed to controvert the truth of the facts stated in the complaint (*R.* v. *Doherty*, 13 East. 171). It may be doubted how far these reasons apply to Scotch practice, which, as we have seen, is founded on the common law in the case of *meditatio fugae* warrants, and in lawburrows does not rigidly exclude proof by a respondent disputing the facts alleged against him. Mr Saunders further proceeds on the assumption that the first summons under this section shall only be issued as he advises, on satisfactory and conclusive evidence of the intention to abscond, and not on a *primâ facie* case merely. Upon the whole it is surely advisable that, as nothing in the statute is inconsistent with doing so, Scotch justices and sheriffs should follow the recognized practice of their own country in similar cases; viz., having granted the warrant upon a relevant petition supported by oath, that they should afterwards allow the respondent to redargue the statements in the petition by evidence adduced immediately or at a very early diet.

The 9th sec. empowers two justices or sheriff, after proof of the complaint, to give redress for the breach of contract or inflict punishment for the offence complained of. Under 4 Geo. IV., c. 34 the court could only send the defender to prison with hard labour for a period not exceeding three months, abating wages during imprisonment, or abate the whole or any part of his wages, or discharge him from the service or employment. They have now many alternatives. They may, upon conviction, (1) abate the whole or any part of any wages already due; (2) direct the specific fulfilment of the contract of service exacting security therefor; (3) annul the contract, apportioning the wages due for so much of it as may be completed; (4) where pecuniary compensation cannot be assessed, or is an inadequate remedy in the circumstances, impose a fine not exceeding £20; (5) fix the damages and costs to be paid to the party complaining in-

clusive of any wages abated. If the party complained against fail to find security to obey an order made to fulfil the contract a justice or the sheriff (6) may commit to prison for not more than three months; and power is given (7) to assess compensation or (8) impose a fine in addition to the annulling of the contract. There is no new power conferred to annul an indenture of apprenticeship. A bond of caution for fulfilment of a contract may be enforced (sec. 10) when two justices or the sheriff are satisfied as to the non-performance, by an order for forfeiture of the whole or part of the sum secured, which sum shall be recovered under the Summary Procedure Act, 1864, and a part not exceeding one half may be applied (sec. 13) as compensation to an employer or employed for the breach of contract or other wrong complained of. An order for payment of money may be enforced by poinding or imprisoment, and imprisonment shall be a discharge of a fine or of any sum assessed as compensation. If any injury to property, misconduct, or ill-treatment, shall appear to be of an aggravated character, and not to have been committed in the *bonâ fide* exercise of a legal right existing, or *bonâ fide* believed to exist, and where the other remedies provided appear to be insufficient, the justices or sheriff may imprison for not more than three months. An appeal to Quarter Sessions is allowed upon finding security (sec. 15). Parties are competent witnesses (sec. 16). Wages are not payable during imprisonment (sec. 17). The Act is not to prevent proceedings by civil action (sec. 18), or criminal indictment (sec. 19), if otherwise competent.

The Act leaves room for future agitation in omitting to declare that fine or imprisonment under the Act shall annul the contract. After some discussion and fluctuation it appears to be decided in England that a contract of service is not determined by imprisonment, and that a workman who has contracted to serve for (say) a year, and has undergone a term of imprisonment for deserting his work, may be proceeded against anew for not returning to work on coming out of gaol (*Unwin* v. *Clarke*, 35 L.J., Mag. Ca. 193). In this respect the Act of 1867 seems to have the same effect as that of 1823.

PRACTICE UNDER THE DEBTS RECOVERY ACT.

IN a former article we stated our opinion as to the general principles on which this statute appears to be based. We shall now indicate very shortly some of the points of practice which will probably arise under it.

I. *To what actions does the statute apply?* The answer made in Section 2 is, "All actions of debt that may competently be brought before a Sheriff for house maills, men's ordinaries, servants' fees,

merchants' accounts, and other the like debts." These are the words of the Act 1579, cap. 83, establishing the triennial prescription,—with the important qualification omitted, "that are not founded upon written obligations." The cases therefore that have occurred as to the application of the triennial prescription may be usefully referred to by the practitioner, and the principles which they have established appear to be these:—

(1.) House maills and other the like debts are rents of subjects properly urban. Arrears of the rents of farms or a minister's glebe are not included. If the rent sued for is for both house and land, the competency will depend on the question which is accessory to the other.

It appears not to be lawful to sequestrate for rents *currente termino* under this Act. Sec. 5 of the Small Debt Act relates only to the recovery of rents actually due—the form of the Summons in Schedule B being—"Whereas E. F., defender, is owing to the pursuer the sum of L. , being the rent for premises possessed by him from —— to ——, which rent the said defender refuses or delays to pay." By Section 28 of the Act of 1853 this provision is extended "to all sequestrations applied for *currente termino* or in security." Section 26 of this statute, extending the Small Debt jurisdiction from L.8 6s. 8d. to L.12, is recognized, and Sec. 5 of the Small Debt Act is duly incorporated; but for some inscrutable reason the 28th section of the Act of 1853 has not been incorporated. It follows that under the Debts Recovery Act it is only competent to sequestrate in execution, and when the diligence is to be used in security of rent exceeding L.12, recourse must be had to a summons in the Ordinary Court.

(2.) Men's ordinaries and other the like debts are entertainment furnished by a boarding-house keeper or lodging-house keeper, or aliment due under a contract. A claim of relief by the mother of an illegitimate child against the father, or the claim of recompence competent to a *negotiorum gestor* in respect of advances made for behoof of a minor, is not included.

(3.) Servants' fees and other the like debts embrace not only the wages of domestic servants, but all payments of the nature of salary or remuneration for services as an apprentice, factor, grieve, chamberlain, or indeed in any situation, even although no express contract of service can be established. But the sum due under a special contract for going to London as a professional witness is not subject to the operation of the statute.

(4.) The expression, "Merchants' compts," has given rise to considerable discussion. The word merchant—(the French *marchand*)—appears to be ancient Scotch for tradesman or shopkeeper. The statute applies to tradesmen's accounts of every description, whether wholesale or retail, whether artificers or shopkeepers—to the accounts of law agents, surgeons and apothecaries, printers, surveyors —a claim by a sub-contractor against a principal contractor for ex-

cavation, and by an advocate's clerk against the agent by whom the advocate was instructed. Mr Dickson says that the statute does not apply to the claim for the price under an isolated sale of goods, but the contrary has since been decided by Lord Kinloch (*Gobbi* v. *Lazzaroni*, 19th March 1859, 21 D. 801). It does not, however, embrace claims for repetition of cash advances. Nor does it apply to accounts arising out of the contract of mandate, or *negotiorum gestio*, or generally, out of any relation of a fiduciary kind. It does not apply to the balance due by the commission agent to his principal, by the consignee to the consignor, by the ships-husband to the ship, or to a claim against a person who has intromitted with one's funds. In all such cases, the right vested in the pursuer is merely the right to call the parties to account, and is quite a different case from a suit for domestic furnishings, which was chiefly in view when the three years' prescription was established. The cases are collected and commented on in *Mackinlay* v. *Mackinlay*, 11th Dec. 1851, 14 D. 162. It also follows that under this statute no action can be brought for money paid, where the consideration has failed, *e.g.*, where the contract has been rescinded, or there has been a breach of warranty. There is no room under this Act for actions of damages, on bills, or for recovery of penalties or public rates.

II. *Is the Sheriff-Clerk bound to frame the Summons?* In many counties, since the Small Debt Act came into operation, it has been the practice for parties with nothing in their hands but the account to be recovered to go to the office of the Sheriff-Clerk, and require him to "give them a complaint for *that*." The Sheriff-Clerk takes one of the printed forms and fills it up in the manner required, at great personal trouble to himself, and with a certain amount of risk, for he makes himself liable for mistakes in its preparation. This practice, though a very convenient one for the parties, is wholly unwarranted by the statute. Nowhere in either the Small Debt Act or the Debts Recovery Act is it enacted that the Sheriff-Clerk shall do more than sign the Summons after it is presented to him for that purpose, his signature being the officer's warrant for citing the defender. But the party himself suing under these Summary Acts must, like any other litigant, frame his own writ. (See remarks of Sheriff Smith in Dundee Sheriff Court, which are reported on another page.)

III. *The first deliverance.* After the pleas of parties have been noted, the Sheriff is directed (Sec. 8) to fix a time and place for proceeding to try and determine the cause, "and shall ordain the parties "then to attend, and shall grant warrant to cite witnesses, which war- "rant shall be signed by the Sheriff-Clerk, and shall have the same "force and effect as if it had been contained in the Summons and "Complaint." We believe that various rural Sheriffs have been much puzzled to see how they can grant a warrant without signing it, and

how the Sheriff-Clerk can with propriety sign the Sheriff's warrant. We believe, indeed, that in several counties a serious miscarriage has already occurred. In some printed forms which have come under our observation, there is a skeleton interlocutor following the summons, to this effect—"The Sheriff-Substitute appoints the case to be tried and determined on," &c. ; "ordains the parties then to attend, grants warrant to cite witnesses and havers, &c." And this interlocutor is signed, not by the Sheriff, but by the Sheriff-Clerk. It should not be necessary to point out that this is a radical nullity, for an *interlocutor* signed by anybody but the Sheriff is no interlocutor at all.

To understand what was meant to be done, it must be kept in view that the old Small Debt Summons contained a warrant to the officer not only to cite the defender, but also to "cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter," and the summons was signed by the Sheriff-clerk. But in the summonses issued under the new Act the words quoted are omitted, and they only become necessary after the parties have appeared and explained the ground of action and the nature of the defence. The Sheriff-substitute having adjusted the issue, his next duty is to fix a time and place for the trial. How is this to be done? Not by any separate and formal interlocutor, but by a marking in the interlocutor column of the Court Book, thus:—"Case to be tried here on Monday, the 10th, at 10 o'clock. The Sheriff's signature at the foot of the page authenticates each entry, and by section 15 this Court Book or Book of Causes, as it is called, is to contain, *inter alia*, the "several Deliverances or Interlocutors of the Sheriff." This marking in the Book is the Sheriff-clerk's authority for issuing the warrant to cite witnesses and havers. The warrant to cite witnesses, which is to be signed by the Sheriff-clerk, should simply be in the language of the omitted portion of the old Small Debt Summons, thus:—

"A. B., Sheriff of the Shire of to Officers of Court, jointly and severally,—

"Whereas the action now before me, raised at the instance of C. D., Pursuer, against E. F., Defender, has been appointed to be tried and determined on Monday next, at 10 o'clock, within the Court House of , you are hereby required to cite witnesses and havers for both parties to compear at the said place and date to give evidence in the said matter.

"J. P., *Sheriff-Clerk.*

IV. *Counter Claims and Multiplepoindings.*—The Small Debt practice as to Counter Claims does not seem competent under this Act. Section 11 of the Act of 1837 allows any counter account or claim to be pleaded against the sum sued for, provided it is served on the pursuer one day before the trial in the form set forth in

Schedule A. But section 11 is not among the sections incorporated by section 5 of the new Act, and therefore the practice just remains as it is at common law, namely, a counter claim can in no case be pleaded, unless it be of such a kind as will found a plea of compensation. This reading is, perhaps, not reconcileable with the painful anxiety exhibited in various parts of the new Act, "that the counter claims to be made under the authority of this Act shall only be of the nature and value set forth in the second section hereof;" but this only proves that the framers of the Act really did not very well understand the scope and effect of their measure.

As regards Multiplepoindings, the provisions of the new measure reach the climax of absurdity. It is of the very essence of this process that every creditor of the common debtor should be brought into the field. But observe what the Statute says. While actions of multiplepoinding under the 10th section of the Small Debt Act are made competent to the extent of £50, it is expressly provided "that *the counter claims* or *claims* in such actions shall be of the nature and value set forth in the 2d section hereof,"—*i.e.*, "house-maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts." The intention, no doubt, is (although it is not very clear from the absolute incorporation of the 10th section of the Small Debt Act) to make the multiplepoinding competent only where the fund *in medio* belongs to the class of debts specified, but it is most absurd, and practically will amount to a denial of justice, to exclude all *claims* in the multiplepoinding, except those of the nature of the debts specified in the Act. The favoured creditors under the Act will receive an undue preference over those whose claims do not fall under the specification. What can be more unreasonable and unjust than to say, for example, that a person holding a bill, or other liquid document of debt, should be in a worse position than the merchant who simply makes out his account, or probably presents a "pass-book." The only remedy is for the Sheriff to exercise the power with which he seems to be vested, of sending a mutiplepoinding, at any stage, to the Ordinary Roll.

V. *Procedure where the Defence raises an Issue of Law.*—This is a very important matter, because it deeply affects a question which is much agitated, and is felt to be one of extreme difficulty, namely, whether there is an appeal on *law?*

Let us suppose the simplest case. At the first calling, the Sheriff's Note of Pleas is:—"The defender says, that on the facts stated in the summons he is not liable." The Sheriff is then bound to fix a time and place for the trial of this question. On the day appointed the Statute says, (sect. 8,) "he shall proceed to hear parties *vivâ voce*, and examine witnesses or havers on oath,"—that is to say, he may do so if any witnesses are tendered, but where no evidence is offered, and probably also when a minute of admissions is put in,—his sole duty is to hear the parties *vivâ voce*, and thereafter pro-

nounce judgment. This judgment, unless appealed from, is to be (sect. 8) as nearly as may be in the same form as a decree under the 13th section of the Small Debt Act,—that is to say, there is a mere entry in the interlocutor column of the Court Book, which may, if desired, be afterwards followed by a decree signed by the Sheriff-clerk, containing nothing but a simple finding to the effect, that "the defender is liable in a certain sum to the pursuer." (See the form in No. 7 of Schedule A of the Small Debt Act.)

In such a case as we have supposed, it does not seem to be incumbent on the Sheriff to frame an "interlocutor setting forth the separate findings in law and fact on which he has proceeded in giving judgment." That is only necessary where there has been evidence adduced, and where that evidence has been recorded "*as above provided for*," (sect. 9),—*i.e.*, in any one of the modes specified in sect. 9. Therefore, it is not even necessary when the evidence is contained in a minute of admissions. This reading is confirmed by section 15, which says, that the Book of Causes shall contain the "several deliverances or interlocutors of the Sheriff (except those interlocutors setting forth at length the separate findings in law and fact upon which any judgment of the Sheriff shall have proceeded, of which interlocutors the dates only shall be entered in the Book of Causes)." Consequently, a mere note in the Book is all that is needed, except "where the evidence has been recorded, as above provided for," (sect. 9).

VI. *Is there an Appeal on Law?*—We are now in a position to approach this difficult point, and we naturally start with the principle laid down in section 17. "No interlocutor, judgment, order, or decree pronounced under authority of this Act, shall be subject to reduction, advocation, suspension or *appeal, or any other form of review or stay of diligence, except as herein provided, on any ground whatever.*" The appeal which is to lie to the Sheriff, and after him (but only after him, and in no case heard by the Sheriff-substitute in the first instance, directly) to the Court of Session, is subject to the provisions of section 10, the rubric of which is, "Appeal competent only when note of evidence has been taken." Unfortunately the section does not exactly say so. It says,—"When neither party has, in the manner above provided, required the Sheriff to take a note of the evidence, it shall not be competent to appeal against the judgment which he shall pronounce, *in so far as the findings in fact pronounced by him are concerned*, and *the said findings* shall be final and conclusive, and not subject to review by any Court whatever." But under sections 8 and 9, if the evidence has not been recorded, there are no findings in fact at all; and what remains to go up to the Court of Appeal? Nothing whatever; and compliance by the Sheriff-clerk with sections 11 and 12 becomes impossible.

Sec. 11 says that when an appeal is to be taken to the Sheriff, the Sheriff-clerk shall forthwith transmit to him the Summons or Com-

plaint, *the Interlocutor of the Sheriff-substitute*, and the Note of Evidence. But if the evidence has not been recorded, where is the interlocutor which is to be transmitted? There are no findings in fact, because there are no facts to find. There is no decree in the form of sec. 13 of the Small Debt Act, which is referred to in sec. 8 of this statute, because, *till the case is at an end, it is not competent to issue said decree.* The words of sec. 11 are explicit, and leave no room for doubt on the point. "The judgment of the Sheriff shall, at the expiry of the period allowed for appeal hereinafter mentioned, and if not appealed from during the same, *be extracted*, as nearly as may be, in the *same mode*, and have the same force and effect, and be followed by a like execution and diligence as a decree obtained under the 13th section of the first recited Act and relative Schedule." This is the decree printed in skeleton on a small debt summons; and its true character is seen from the above quotation. It is not a judgment, but the final extract—the last thing to be done in a case; for in sec. 12 we have the same provision relative to cases which go to the Court of Session. Their Lordships are "to affirm or alter the judgment of the Sheriff, and shall remit to him or the Sheriff-substitute to decern accordingly, or to pronounce such other judgment as shall seem just; and such decree shall be extracted as nearly as may be in the same mode, &c., as a decree obtained under the 13th section of the first recited Act." *

It follows from these provisions that the decree spoken of in sec. 11 cannot be made the subject of an appeal. And what remains? Nothing but the bare entry in the interlocutor sheet of the Court Book, "Finds the defender liable in L.50, with L.4 expenses." That cannot be made the subject of an appeal, because the Sheriff-clerk dare not part with his Court Book, and there is no machinery by which an extract or certified copy of the entry can be obtained. At all events it cannot be held to be the "Interlocutor" which is to be transmitted to the Sheriff with the rest of the process, and the transmission of which is a condition precedent to the right of appeal. The conclusion therefore to which we come is that no appeal will lie to the Sheriff unless his Substitute has pronounced a special interlocutor containing findings in fact and law; and this he is not entitled to do except in the solitary case mentioned in sec. 9, namely, "where the evidence has been recorded as above provided for." *

* In the case of *Baxter* v. *Kennedy*, heard at Perth as a Small Debt Appeal by Lords Deas and Neaves on 11th September 1861—4 Irvine, p. 84—the appellant had been pursuer, and the judgment being in favour of the respondent, he had never asked from the Sheriff-clerk an extract, and took the objection of "no process" when the appeal came to be argued. The appeal was dismissed, as there was no evidence before the Court that any such decree had been pronounced as that which the Court were asked to review; both of their Lordships indicating an opinion that the Book was not the final decree, being only a memorandum of the judgment. But in *Sinclair* v. *Rosa*, heard at Glasgow by Lords Neaves and Jerviswoode on 25th April 1863—4 Irv. 390—it was expressly decided that in a Small Debt case the *decree* is contained in the Sheriff Court Book (which was produced), and which, being the only thing authenticated by the Sheriff, is the best evidence of it that could be produced

For the same reasons we are inclined to hold tha tthere is no appeal to the Court of Session on law; for unless the evidence has been recorded the "Process" which would be sent up under an appeal would be merely the Summons, Note of Pleas, and Minute of Admissions. The Court of review would have no means of finding out what had been decided except from the statement of the appellant.

These views are submitted with much diffidence; but if they are sound, this is certainly a wonderful Act. In England you appeal on *law* only from the County Court. In Scotland you can only appeal on *fact*. At least you cannot appeal on law without appealing on fact at the same time; and you cannot appeal on law where the facts are not disputed.

We had several other points noted for the consideration of our readers, but the above are the more important. A more deliberate examination of the Act has not modified our original opinion as to its deficiencies. Its best friends can only say for it that it may be useful for getting cheap decrees in absence; and that whenever a case goes beyond that, it may be easily transferred and proceeded with according to the ordinary forms of process. We rise from the study of this statute more than ever convinced of the necessity of a movement being made by the profession for its repeal, and the substitution of one GENERAL CONSOLIDATION ACT relative to the Forms of Process in the Inferior Courts.

NOTES IN THE INNER HOUSE.

BILLS OF LADING.

Maclean and Hope v. *Munck; Moes, Moliere and Tromp* v. *Leith and Amsterdam Steam Shipping Company; Adamson, Howie and Company* v. *Guild.*

A BILL of Lading, speaking generally, serves two purposes in the business of merchants: it is the evidence and measure of the rights and responsibilities, *inter se*, of the shipper and shipowner or master; and it is a convenient instrument for effecting a transfer of the property of goods which are not in the actual possession of the vendor. As Lord Neaves, in one of the cases before us, expressed it, with accustomed felicity, "it is a shorthand charter party, by which in a simple form the liability of the shipowner is expressed, and the owner of the goods is enabled to transfer the property." The two decisions first named relate to the bill of lading in the former capacity; the third case only directly concerns its negotiability. This was a case of adjustment of issues, involving many points of law which were left for discussion after the trial. It may be dismissed for the present, with the remark that the issues were settled upon the -es tablished principle, recognised in *Stoppel* v. *Stoddart*, 11 D. 676, 13

D. 61, that in a reduction by a seller of an indorsation of a bill of lading, fraud on the part of the indorsee is an essential part of the case, and must be put in issue; although in a reduction at the instance of creditors that would be unnecessary, the fraud and insolvency of the granter of a deed or preference being a sufficient ground of reduction (see *M'Cowan* v. *Wright*, 15 D. 494). The case of *Adamson, Howie, and Co.* v. *Guild, &c.*, differs from that of *Stoppel* v. *Stoddart*, in respect that it is directed against the bankrupt's trustee and the indorsees of the bill of lading; while the singularity of *Stoppel* v. *Stoddart* was that the trustee had joined with the seller of the goods as a pursuer of the action. He thus occupied a false position, and the defeat of the indorsee benefited only the seller, who was preferred to the trustee in the competition for the fruits of their joint victory.

The case of *Maclean and Hope* v. *Munck* will be remembered for the exquisitely finished judgment of Lord Neaves, explaining the principle of the contract expressed, but not constituted, by a bill of lading. The contract is one of those which are constituted, not *verbo* or *literis*, but *re:* that is to say, by the actual shipment of goods. The indorsation of the bill of lading is an assignment of all the goods shipped; it substitutes the indorsee for the shipper, and makes him the owner of them to the effect of giving him the *rei vindicatio* competent to the proprietor of the *goods shipped*. But the idea of a man being proprietor of goods which never existed is nonsense. The shipper, or his indorsee, cannot by a *rei vindicatio* get more goods than were actually shipped, and they cannot recover against the shipowner for such goods in consequence of a false statement as to quantity in a bill of lading signed by the master, who is not authorised to grant such a document except for goods shipped. Such were the premises on which the Court proceeded in dismissing as irrelevant an action by indorsees of a bill of lading against the shipowner, concluding for payment of the price paid by them for the goods in the bill of lading, so far as these goods were short delivered, but failing to allege as a fact that the quantity of goods mentioned was shipped. This decision is in conformity with the understanding of merchants, for in the usual course of business bills of lading are signed only for goods actually received on board. It is in accordance with recent English decisions: *Grant* v. *Norway*, 10 C.B. 665; *Hubbersty* v. *Ward*, 8 Exch. 330. It is even foreshadowed in the great case of *Lickbarrow* v. *Mason*, 2 T. R. 63, 2 Ross's L. C, 92, 105, where Buller, J., speaking of the argument of "hardship on the vendor," urged against the doctrine that indorsation of a bill of lading transfers the property, and prevents stoppage *in transitu*, says, "An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all. The answer is, that under these circumstances a bill of lading could not possibly exist, if the transaction were a fair one; for a bill of lading is an

acknowledgment by the captain of having received the goods on board his ship; therefore it would be a fraud in the captain to sign such a bill of lading if he had not received the goods on board; and the consignee would be entitled to his action *against the captain* for the fraud." The Bills of Lading Act (18 and 19 Vict. c. 111, § 3) also makes bills of lading "conclusive evidence of shipment of goods as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless the holder has notice of the fact, and with a reservation in case of fraud by the shipper. Thus, by implication, both Mr Justice Buller and the Legislature exempt the shipowner from liability for the act of his agent in the case in question—even in a question with an onerous indorsee. It would seem, however, that where the bill of lading is given to a person shipping goods on behalf of a principal, and the agent afterwards indorses it to his principal, but the goods are not shipped, the indorsee will be affected by the knowledge of his agent, *Berkeley* v. *Watling*, 7 A. and E. 29; and Tindal, C. J., said, that, as between the original parties, a bill of lading is only a receipt liable to be opened up by evidence of the real facts, *Bates* v. *Todd*, 1 M. and R. 106; *Valieri* v. *Boyland*, 35 L. J. Ex. 215.

Although the case before us was decided on a point of pleading, it seems to be consistent with these decisions. Various points, however, were raised and left undetermined; and it is proper to enter a caveat against a view adopted by Lord Jerviswoode in the Outer House, which seems to be at variance both with reason and a contemporary case in England. The bill of lading in question specified the weight of bones shipped, and added the clause "weight unknown to," the blank after the word "to" not being filled up. The action was brought on the ground that the full quantity of bones specified in the earlier part of the bill of lading had not been delivered; and Lord Jerviswoode held that the blank in the printed style was intended to be filled up when the clause was to receive effect, and that as it had not been filled up in the present case, the specification of the weight must be held as conclusive against the shipowners. It appears to us that the contention of the defendant ought on this point to have received effect. If possible, both clauses, though at first sight inconsistent, should, according to acknowledged rules of interpretation, receive effect; and it is not difficult to give an intelligible and reasonable construction upon this principle. The master meant to say that a quantity of bones had been put on board *represented as* amounting to 217,239 kilogrammes, but that he had not verified the statement of the shipper, and did not guarantee its correctness. This reasoning is adopted by the Court in the case of *Jessel* v. *Bath*, 36 L. J. Ex. 149, although there also the judgment is actually rested on another ground. Why then was the weight inserted at all? For the purposes of freight, as Bramwell, B., puts it in the case cited; or more probably for the reason assigned by

Pollock, C. B., and Wilde B., in their joint judgment in an instructive case very similar to this, which only fails to be an important authority in consequence of an equal division of opinion on the Bench. In *Bradley* v. *Dunipace* (1861), 7 H. and N. 200, these judges replied to this question thus, "To enable the merchant to sell the goods before arrival. Without it there would be no definite quantity to sell." Lord Jerviswoode's opinion is justly so much respected that it is the more necessary to state our objections when we conceive him to have erred on a matter of some importance.

In *Moes, Moliere and Tromp* v. *Leith and Amsterdam St. Sh. Co.*, there was a special verdict finding that a quantity of sugar was shipped on board defenders' vessel at Amsterdam in good condition, that on delivery at Leith it was damaged by breakage, but that it was not established by the evidence what was the immediate cause of the damage. The bill of lading contained in the usual place an exception of the shipowner's liability for loss arising from the act of God and a number of other causes; and after the clause "In witness whereof" there was added a further limitation—viz., "Weight, contents, measure, quantity, and value unknown, and not answerable for damage, leakage, lighterage, *breakage*," &c. Both parties claimed that the verdict should be entered up for them. The Court was equally divided, and the case was reheard before seven judges, when four held that the verdict should be entered up for the defenders, and three for the pursuers. The Court was agreed that under the first restrictive clause the onus lay upon the shipowner to prove that any loss or damage accruing was due to one of the excepted causes, and that the effect of the second restrictive clause (which the Lord President said looked like an "afterthought" in the style according to which the bill of lading was framed, but which was equivalent to, and may conveniently be called, a "memorandum on the margin") was to throw the onus on the shipper, as in any other contract of custody, to prove that the loss had occurred by the fault of the shipowner, who was in regard to the causes of loss therein enumerated just in the same position as any other custodier of goods, liable only for his own default. The minority, however, held that as the jury had not found that the shipowners had used due care in conveying the goods, the defenders could not claim the benefit of the memorandum. The majority thought that the intention of the limitation as to breakage was just to take the case out of the rules applicable to carriers, and make it depend on the rule of common law, according to which negligence must be proved by the party alleging it. The opinion of the minority was founded on Mr Bell's dictum "that the master and crew shall take due care of the goods, according to the diligence prestable in the contract of location" (Com. I. 554), which brings into operation the principle frequently applied in the hiring of horses in Scotland—viz., that the borrower "must prove the accident and his own diligence," a principle which Fountainhall (*Binny* v. *Veaux*, M. 10,079) thought "perquam durum," and which

has not been received in England. That which chiefly weighed with the majority was that if this principle received effect, the condition "not answerable for breakage" would have no meaning at all, as it was impossible to hold that it was intended to exempt the shipowner from responsibility for breakage arising from his own gross negligence. This has long been settled by English cases (*Phillips* v. *Clark*, 2 C. B. N.S. 156; *Lloyd* v. *Gen. Screw Collier Co.*, 33 L.J. Ex. 269; *Grill* v. *Gen. Screw Collier Co.*, 35 L.J. C.P. 321, s.c. 1 L.R. C.P. 600). And the main question in the case, that of *onus probandi*, was decided by the judicial committee of the Privy Council last year, as it is now decided by the Court of Session. In *Ohrloff* v. *Briscall*, 35 L.J. P.C. 63, 1 L.R. P.C. 231 (a case not cited in the argument in the Scotch Court), charterers shipped on board the *Helene* a cargo consisting of casks of oil, wool and rags, and personally superintended the stowage. The bill of lading bore on the margin a memorandum, "not accountable for leakage." In the course of the voyage the oil casks became heated by contact with the wool and rags, and a very large quantity of the oil was lost by leakage. It was held in a suit against the ship for damages that in the circumstances the shipowners' ignorance of the consequences of stowing the oil casks along with the wool and rags did not amount to such negligence as to render them liable for the loss. The judgment of the Court of Appeal contains this passage:—"For the respondents it was contended that the word ('leakage') means only ordinary leakage (which according to the evidence amounts to 1 per cent.), and does not extend to extraordinary leakage, such as that in question, amounting to an alleged deficiency of 2000 tons. On the part of the appellants it was denied that, according to the natural and ordinary meaning of the words employed, the amount of leakage was at all limited in quantity; but it was conceded that, in accordance with *Phillips* v. *Clark*, the words on the margin did not protect the shipowners from responsibility for leakage occasioned by their own negligence. It was however contended on behalf of the appellants that the plaintiffs must, in order to entitle themselves to the action, give satisfactory proof of such negligence, and that they had failed to do so; and, after a careful consideration of the case, we have come to the conclusion that this contention is well founded." After reviewing the facts the judgment proceeds—"For these reasons we think the respondents failed to prove that the leakage was caused by the appellants' negligence. . . . . The memorandum in the bill of lading protects the shipowner as to all leakage, except that caused by negligence, and therefore, if no negligence is shown, there is no cause of action."

The Month.

Business of the Court of Session.—The cases waiting for debate in the Outer House are as follows:—Lord Kinloch, 14; Lord Jerviswoode, 22; Lord Ormidale, 12; Lord Barcaple, 18; Lord Mure, 7. The First Division roll contains 75 ordinary actions and 4 summary cases waiting for hearing; and 17 ordinary actions and 24 summary actions not ready for hearing, or in which the parties are not moving. The Second Division roll contains 71 ordinary and 3 summary cases ready for hearing; 23 ordinary and 21 summary cases not ready for hearing, or in which parties are not moving. The rolls show a great decrease on the arrears of summar roll cases, and a corresponding increase in the arrears upon the long roll. The extended sittings of the Inner House begin on November 1, but the Lords Ordinary do not take their seats, nor does the regular work of the winter session begin, till November 12. Some of the Lords Ordinary have fixed diets of proof in the first fortnight of November. The number of cases in the Calling Lists during the Vacation was 171, being an increase of 20 above the number called on the two box days in Autumn Vacation 1866.

The Atmosphere of the Parliament House is one of the things which every one, except a few old fogies, complains of, but which no one tries to remedy. Hot air is pumped up, fresh air is excluded, and dust is accumulated until the air in the Outer House is like that of the Arabian desert, deteriorated by carbonic acid exhaled from a thousand legal lungs. Vitiated as the air of the Outer House is, it is pure compared with the air which you attempt to breathe in the close boxes of the Lords Ordinary, especially while a proof is going on. No epithet can describe the aggravated abomination of that air except one—it is absolutely putrid. Unless it is desired to shorten the lives of the members of the legal profession, or to prevent those who have weaker frames from going through an equal quota of work, there is surely no reason why this state of things should continue. If a system of scientific ventilation cannot be at once applied, why should not the daily misery of the profession be at least alleviated by having the windows partially opened, a simple measure which has probably never occurred to the comfortable people who have the charge of such matters. It would be easy for some one in authority to give the necessary directions for letting in some pure air in this way,—failing which, there seems to be no remedy except for the junior bar to come up in the morning provided with stones and catapults, and to make riddles of the great windows.

Scottish Criminal Statistics.—In a very clear and well digested paper on the "Distinctive Features of Jury Trial in Scotland in Civil and Criminal Procedure as compared with that adopted in England

and Ireland," (Edin., Constable), which was read by Mr Gilbert Rainy Tennent at the late meeting of the Social Science Association, the curious statement is made, that "the proportion of convictions to committals in Scotland in 1865 was 32·07 per cent., and in 1866, 30 per cent.; and of acquittals to convictions, 1865, 8·06 per cent.; 1866, 9·65." This would show an extraordinary inefficiency in the administration of criminal justice, and indeed the figures are so absurd that Mr Tennent could not have quoted them had he not rather hastily adopted the authority of an official abstract. How so huge a blunder got in there, we do not try to explain. It occurs verbatim as Mr Tennent gives it, in the "Abstract of the Tables of Criminal Offenders for the year 1866, reported by Her Majesty's Advocate for Scotland." The statement on the face of it leaves unaccounted for nearly 60 per cent. of the total committals of 1865, and more than that proportion of the committals for 1866. The fact is, that there is not one correct figure in the statement, and that the abstract does not truly represent the results of the parliamentary returns. The clerk who prepared it must have been either incapable or asleep. Correctly stated the results are: 1865, convictions 75·713 per cent. of committals; acquittals 24·286 per cent.—1866, convictions 76·55 per cent.; acquittals 23·44 per cent. Convictions include persons outlawed and insane, and acquittals include those discharged without trial. This is the thing which somebody at the British Association meeting at Dundee called "a most excellent and valuable paper;" upon which the *Scotsman* remarks:—

> "Every one knew before that no paper could well be more remarkable for the valuable information which it did *not* contain; and we now know that no paper could well be more remarkable for the erroneous character of such information as it pretends to give."

Reports of Sheriff Court Decisions.—We have resolved to devote a few pages of the *Journal* to Notes of Cases decided in the Sheriff Courts. The reports of such cases must necessarily, however, be brief and carefully selected, both because the space which we can afford is limited, and because, from the nature of the thing, such reports can very seldom be of authority. The notes which we propose to give are intended to be useful (as indeed our notes of cases in general are mainly intended to be) for information and suggestion rather than for citation as authority. As it would be vain to organize a regular system of reporting for such a purpose, we are obliged at starting to appeal to the public spirit of our readers to furnish us with notes of cases of interest in the Sheriff Courts. And we may suggest that the classes of cases most useful for our pages are those in which the jurisdiction of Sheriffs is privative or final, practice cases, cases of procedure under statutes, especially under recent statutes, and generally actions which are brought less frequently in the Court of Session. But we do not wish to exclude any case which raises points of importance or novelty.

Procurators' Apprentices.—The 23d section of the Debts Recovery Act, 30 and 31 Vict. c. 96, remedies the hardship imposed on this class of apprentices, many of whom never become procurators, and with whom money is not always superabundant, by the 24th and 25th Vict., c. 91, s. 34, and the Procurators' Act, 28 and 29 Vict., c. 85. The former Act forbids the registration of any deed or instrument liable to stamp duty, unless the same is duly stamped, while the latter requires all indentures of apprenticeship to procurators (which require £30 stamps) to be recorded within six months from the beginning of the apprenticeship. Previous to the Act of 1865 the practice was to execute an agreement between master and apprentice on a 2s. 6d. or 6d. stamp. The new Act provides that the indenture required by the Procurators' Act shall be held as duly stamped, for the purpose of recording, if it bear a 2s. 6d. stamp, and that the remainder of the duty shall be paid on the admission of the apprentice as a procurator in addition to the stamp duty then payable on such admission. It appears from a correspondence published in the *Scotsman* that since 1865 various indentures unstamped or on sixpenny stamps have been recorded, and complaint is made that the Lord Advocate has made no provision in the Act as to these. We do not see that the Legislature was called upon to grant an indemnity for a violation of the law committed with full knowledge. We give no opinion at present as to the proper remedy where the requirements of the former Acts have not been complied with. A correspondent refers to the Act of 1850 enabling parties to get the opinion of the Commissioners of Inland Revenue as to the deficiency of stamp duty:—

"And at same time their indentures will be stamped with the full penalty of £10, or such modified penalty as the representation may infer, and after that, in terms of Act 1850, their indentures "shall be receivable in evidence." £10 is a far lighter penalty than reserving the time if more than a year has run. As for those who neither had their indentures stamped at all nor registered, thus ignoring both the Revenue and Procurators' Acts, the only course that seems open to them is to begin their apprenticeship as at May 1867—getting it registered and certified now under the half-crown stamp, in terms of the 1867 Act. The loss of time seems inevitable, as no representation could be expected to take effect with the Commissioners unless based on ignorance of the law or inadvertency. So much for the procurators' apprentices. One word as to other professions. If other apprentices were exposed to the same risk of challenge as procurators, it would be found that not one in a thousand ever file even a half-crown stamp. It is only because he is constantly in court, that a procurator's qualifications are so narrowly scrutinised, and that he cannot get off so easily as the session-clerk, who plies his vocation in perhaps every parish in Scotland unlicensed, although scheduled for a qualifying instrument."

County Constabulary.—A correspondent of the *Scotsman* inquires "how it is that during the last seven years, twenty out of twenty-seven superintendents have resigned and left the service?" And also, "how it is that, during the same period, four chief-constables have been appointed from beyond the pale of the service?" Perhaps some of our readers may be able to answer the queries.

Royal Commission on the Administration of Justice in England.—The Government has appointed a Commission, with a view to effect

"the greatest law reform as yet adventured,"—the revision, it may be the reconstruction, of the entire machinery for the administration of justice in the Superior Courts of England. The greatest credit is due to the adviser of this bold and wise step, whether it be the Lord-Chancellor or the Attorney-General, and upon the whole (though the absence of Lord Westbury is remarkable) the Government is also to be praised for the selection of Commissioners. It is much to be wished that Scotch lawyers of eminence would press for a similar Commission for Scotland. The Commissioners are—Lord Cairns, Sir W. Erle, Sir J. P. Wilde, Sir W. P. Wood, Mr Justice Blackburn, Mr Justice Smith, Sir J. B. Karslake, Sir Roundell Palmer, Mr W. M. James, Mr J. R. Quain, Mr H. C. Rothery, Mr Ayrton, M.P., Mr Hunt, M.P., Mr Childers, M.P., Mr J. Hollams, and Mr F. D. Lowndes. Mr T. J. Bradshaw, Barrister, is Secretary. The Commissioners are directed to inquire into the operation and effect of the present constitution of the English Court of Chancery, the Superior Courts of Law at Westminster, the Central Criminal Court, the Court of Admiralty of England, the Admiralty Court of the Cinque Ports, the Courts of Probate and Divorce for England, the Courts of Common Pleas of the Counties Palatine of Lancaster and Durham, and the Courts of Error and Appeal from all the above-mentioned tribunals, as also into the operation and effect of the present separation and division of their respective jurisdictions. The investigation extends to the arrangements for holding the sittings in London and Middlesex and the assizes in England and Wales, together with the present division of the legal year into terms and vacations; the arrangements for distributing and transacting the judicial business of the Courts, with a view to ascertain what changes and improvements may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the same courts, and at the sittings and assizes respectively. The Commissioners are also to inquire into the laws relating to juries, especially with reference to the qualifications, summoning, nominating, and enforcing the attendance of jurors.

Paid v. *Unpaid Police Magistrates.*—A lively discussion, which appears to be periodical, took place on 3d October on this subject in the Town Council of Glasgow. The subject was introduced by Mr J. L. Lang, a Town Councillor, and a member of the Faculty of Procurators highly distinguished for forensic ability and experience. He moved for a Committee to consider as to appointing a stipendiary magistrate or magistrates for the Police Courts of Glasgow, and relieving the bailies from attending thereat. His arguments in favour of the proposal were, the importance of having a trained lawyer to manage cases of great importance to the interests and character of those who were concerned in them, who were often too poor or had not time to procure the aid of a lawyer; that cases often of great civil and pecuniary interest, such as smoke and nuisance cases, were now

intrusted to police magistrates, and that without any correctory review; that the assessors in Glasgow, removeable at pleasure, and dividing the responsibility, were in a false position; that citizen magistrates were not more but less merciful than the professional, and sometimes were too merciful; that the duties of the police bench were a great burden on the mercantile community, the best qualified members of which were frequently prevented thereby from undertaking municipal duty; that the police magistrates as such inflicted fines which in Glasgow they had the disposal of in their character of Commissioners of Police. "In the Police Board, a gentleman got up, and, like the Chancellor of the Exchequer, he was bringing out his budget; he told the Commissioners of Police that so much had been collected from fines during the past year—£5000 and some odd hundreds—and for the next year they might safely calculate on £6000. Was that a thing to be smiled at or laughed at? It was a matter for very serious consideration. He did not believe that the magistrates, acting as Commissioners, ever acted corruptly, but they could not prevent people speaking about it; and they said this, that fines exacted from these people ought not to be disposed of by the parties exacting them." The motion was negatived by a majority of 25 to 12. There are no doubt some arguments that may be fairly urged on the other side, but, from the full report of the proceedings before us, they do not appear to have been known to the councillors forming the majority.

Glasgow Sheriff Court.—At the Appeal Court on Oct. 3, the Sheriff, as usual at the opening of the winter session, gave some statistics of the judicial business of the Court since 1st Oct. 1866. Gross number of new ordinary actions 1263, being 29 above last year, which showed an increase of 66 over the previous year. In 825 appearance was entered, and in 438 decrees in absence were pronounced. The printed rolls of the weekly ordinary courts have contained 5961 enrolments, being an increase of nearly 400. Of these 1646 were motions; 520 adjustments and closing records; 1547 for fixing diets of proof; and 2135 for debates. Enrolments in the Appeal Courts Lower Ward alone, 1695, or 500 above last year. Final judgments in cases admitting of advocation cannot have been less than 500, and, said the Sheriff, "it affords satisfactory evidence of the confidence reposed in the soundness of these judgments that caution was found with a view to advocation in only 15 instances, and in some of these no advocation was carried out." There were 492 summary applications in sequestrations for rent, interdicts, lawburrows, and ejection. The summary applications under statutes 302, mainly under the Police Act, Merchant Shipping Act, Railway, Turnpike, Lands Valuation, and Poor Law Acts. Under the Glasgow Corporation Water Company's Act, four Appeal Courts were held, in which upwards of 1000 appeals were disposed of. There were 466 applications for warrants to commit lunatics; 350 at the instance of the

Inspector of Poor, and warrants were granted on all these applications. The applications for ejectment where the rent did not exceed £30, and where the premises were let for less than a year, amounted to 1696. Under the Registration Acts there were granted 116 warrants, authorising registrars to register births neglected to be registered, and correct erroneous entries; and under the 19 and 20 Victoria, cap. 96, 15 warrants authorising the registration of irregular marriages. 56 *meditatio fugæ* warrants were granted, and 20 of the persons complained of were apprehended and examined. There were from eight to ten applications daily by paupers claiming relief. In Bankruptcy there were 164 judicial sequestrations, a large number of appeals against trustees' deliverances and resolutions of creditors, and a considerable number of competitions for the office of trustee. Of the pending sequestrations, seven were wound up under deeds of arrangement, 35 on composition, and 36 without composition, and 75 trustees were discharged. In the Small Debt Court 23,492 summons were issued, and 631 sists, total 24,123 cases, being an increase of 1450. 620 cases were continued, and heard in Chambers before being decided. There were 295 criminal jury trials, being an increase of 62, and 81 without a jury. 651 judicial declarations were taken from persons accused of crimes, and there were 151 investigations into sudden deaths. The Sheriff announced that a new arrangement had been carried into effect, by which, with the entire concurrence of the Procurators, four ordinary Courts are held weekly. He also observed that "The Debts Recovery Act" necessitated the opening of a new roll of causes, and that it had been arranged that the cases brought under it should be called on the four ordinary Court days at the opening of the Court, but he did not expect that the steps to be taken in such cases on these days would occupy much time, as proofs and discussions would proceed chiefly in chambers. He had considered very minutely the whole provisions of the statute with the Sheriffs-substitute, and had no doubt that it would be interpreted with uniformity and accuracy, and that there would be fairly got out of it whatever advantages it afforded in the limited class of actions to which it applied.

The Glasgow Sheriffs and the Debts Recovery Act.—The following document is printed by our Glasgow contemporary, the *Scottish Law Magazine*, which describes it as "Notes of a Conference between the Sheriff of the County and the Substitutes in Glasgow," and acknowledges its obligations therefor to Mr Sellar, S.C.D. It rather appears to be an informal Act of Sederunt:—

"SHERIFF'S CHAMBERS, GLASGOW, 1*st Oct.* 1867.

"Mr Sheriff Bell had to-day a meeting with the Sheriff-Substitutes at Glasgow (excepting Mr Murray, who was absent from town), to make arrangements for the working of the 'Debts Recovery (Scotland) Act, 1867,' and to exchange views on the more obscure provisions of the Act. The following were the results, viz.:—

"1. That the cases shall be called (before the other cases) in the ordinary Courts of the Sheriff-Substitutes, and the 'Notes of Pleas' in opposed cases taken in Court. 2. Should the parties come with their pleas written, the Sheriff may adopt and authenticate them by his signature, if they appear to be properly stated. 3. The

pleas should be noted before any question of remit to the ordinary Court can be considered. 4. In some cases the Note of Pleas may, of consent of parties, form the record in the ordinary Court, but in the general case it will be necessary to order condescendence and defences. 5. It will be more convenient, at least in Glasgow, to 'try' the cases in Chambers, so that the business of the ordinary Court may be as little as possible interfered with. 6. The power to take proof at large by commission has *not* been conferred. Only on special cause shown may commission be granted to examine any particular witness or haver, or take the oath of a party. 7. It is thought inexpedient, in the meantime, to employ short-hand writers in the taking of evidence, even could the services of proper parties be obtained, which is doubtful. 8. In all opposed cases there is an appeal from the Sheriff-Substitute to the Sheriff; but where no 'notes of evidence' have been taken, this appeal is confined to points of law. 9. There is an appeal from the Sheriff to the Court of Session in all opposed cases above £25; but this appeal, like the other, where no 'notes of evidence' have been taken, is also confined to points of law. 10. Considerable difficulty was found in solving the question how the appeal allowed on points of law, in the cases where no notes of evidence have been taken, could be given practical effect to; but the resolution ultimately come to was, that the Sheriff-Substitutes should, in these cases, issue Interlocutors containing their findings in fact and law, the same as in cases where notes of evidence have been taken; and that the provisions at the end of section eighth, were to be read as more applicable to the form of the extract to be issued by the Sheriff-Clerk, than to the Interlocutor of the Sheriff-Substitute. 11. Where the Sheriff remits back to the Sheriff-Substitute to take new evidence, and re-hear the case, the Sheriff-Substitute should, of new, give judgment. 12. That there are no proper provisions for sequestrations *currente termino*. 13. It is not considered expedient, in the meantime, to take up cases under the Act at the Circuit Court of Wishaw—the only existing Small Debt Circuit in the county. 14. A form for 'Book of Causes,' submitted by the Sheriff-Clerk Deputes, and containing certain additions to the form in the schedule annexed to the Act, was approved of. 15. The summons must necessarily go out with the extract of the decree; but the other papers, such as notes of pleas, note of evidence, Interlocutors, with findings, etc., should be retained by the Clerk. Productions, however, may be borrowed up by the parties in the usual way."

Obituary.—STODART MACDONALD, Esq., S.S.C., (1845), and N.P., died at Cameron House, near Edinburgh, on Sept. 13. Mr Macdonald was a Roman Catholic, and had a large and influential business connection among that persuasion. He was agent for the Edinburgh, Perth, and Dundee Railway Company during its separate existence; and it is reported that during its construction he discovered that very many progresses of titles in the kingdom of Fife were vitiated by serious flaws. He was an able and clear-headed man of business, somewhat formal in manner, but in feeling and conduct a thorough gentleman.

JOHN LEISHMAN, Esq., W.S., (1835), died at Braid House on Sept. 19, from the effects of a fall from his horse. Mr Leishman was Edinburgh agent for the West of Scotland Iron and Coal Masters' Association, and was long known as an active and able practitioner in the Court of Session.

GEORGE M'CLELLAND, Esq., W.S., (1823), died at Edinburgh, Oct. 18.

ALEX. THOMSON, Esq., of Whitrig, W.S., (1818), formerly of the firm of Thomson, Elder, & Bruce, W.S., died at Mains, Tillicoultry, Oct. 10.

DOUGLAS HAMILTON ROBERTSON, Esq., Writer, Hamilton, died suddenly while witnessing a Volunteer Review at Capellie, Sept. 28.

General Council of Procurators.—The annual meeting of this body, which includes twenty-three local faculties and upwards of eleven hundred practitioners before the Sheriff Courts of Scotland, was held in the Faculty Hall, Glasgow, on Sept. 19—Mr Murdoch, Dean of Faculty, Ayr, presiding. The following office-bearers for the year were elected:—President, Mr James F. Murdoch, Dean of the Ayr Faculty of Solicitors; vice-president, Mr John B. Baxter, President of the Faculty of Procurators and Solicitors in Dundee; secretary and treasurer, Mr James W. Barty, Representative of the the Faculty of Solicitors and Procurators of the Western District of Perthshire, Dunblane; special councillors, Mr James Mitchell, Dean of the Faculty of Procurators in Glasgow; Mr A. M'Neel Caird, Dean of the Faculty of Procurators for the Rhins of Galloway; Mr Robert Watt, Dean of the Society of Solicitors, Airdrie; Mr Thomas Falconer, Dean of the Faculty of Solicitors of Inverness-shire; and Mr James Watson, Dean of the Faculty of Procurators of the county of Linlithgow. On Sept. 20 and 21, candidates for admission as Procurators before the Sheriff Courts in Scotland, were examined in the same place by a Committee of examiners appointed by the General Council. Sixteen candidates remitted by Sheriffs for examination, presented themselves, and after a searching written and oral examination, the following were found to be duly qualified for admission, viz.:—Messrs William Smith Neill Patrick, Ayrshire; Archibald Thomas Gray, Stirlingshire; Robert Urquhart, Elginshire; William Bishop Dunbar, Forfarshire; Arthur Wellesley Kinnear, jun., Kincardineshire; Malcolm Stewart, Perthshire; James Auld, Renfrewshire.

Appointments.—Sir William Gibson-Craig, Keeper of the Signet, has appointed Mr John Richardson, W.S., Substitute-Keeper of the Signet, in place of Mr John Hamilton, resigned.

Clerks of Court carrying on business as Agents.—It appears that we were in error in the statement which we made last month that the "Return of all clerks of court in the Court of Session or other courts in Scotland, who either in their own names or in partnership with others carry on business as Writers to the Signet, Solicitors, or Agents," obtained by Mr. Aytoun M.P., for the Kirkcaldy Burghs, had not been printed. It was printed, though not without some delay, at a late period of the session. We now give the return, omitting for convenience of printing the tabulated form. Besides the name of the clerk and his office the return consists of a column headed, "Business carried on either in their own name or in partnership with others as W.S., Solicitors, or Agents," and of a column for remarks.

COURT OF SESSION.

Archibald M'Neill, P.C.S., W.S., Edinburgh, carrying on agency business with a partner, remarks, "Previous to my appointment as a Clerk of Court I carried on business as a practitioner in causes before the Court, but on my appointment as a Clerk of Court I ceased to carry on business as a practitioner before the Court, and from that date have not had any interest directly or indirectly in profits or emoluments derived from litigation or the conduct of causes; I have, however, as all my predecessors from time immemorial have done, retained my other business, such as conveyancing and the management of estates, and in doing so I have had the assistance of a partner in that department of business, so that my attendance on the duties of my office has not been in any respect interfered with."

H. Maxwell Inglis, P.C.S., W.S., Edinburgh, carrying on business as such.

Alex. Mann, Clerk of the Bills, in partnership with Mr. Alex. Duncan, solicitor, Leith.

SHERIFF COURT OF CHANCERY.

Adam Morrison, Sheriff-Clerk of Chancery, S.S.C.; but he does not, either in his own name, or in partnership with any other person or persons, practise before the Sheriff Court of Chancery.

SHERIFF COURTS.

ABERDEEN.—John Legertwood, Sheriff-Clerk, advocate in Aberdeen, carries on the business of a conveyancer in Aberdeen in partnership with Robert Legertwood, advocate, Aberdeen, under the firm of J. & R. Legertwood.

Do.—Alexander Henderson Chalmers, Commissary Clerk, W.S., Edinburgh, in partnership with John Auld, firm Auld & Chalmers, W.S.

Do.—James Augustus Sinclair, Clerk of the Peace, C.A. & bank agent in Aberdeen.

AYR.—Evan A. Hunter, Sheriff-Clerk, W.S., Edinburgh, in partnership with others under the firm of Hunter, Blair, & Cowan, W.S., Remarks: "Mr. Hunter does not carry on business in Ayrshire."

Do.—Robert Goudie, junr., Commissary Clerk, solicitor, Ayr.

Do.—Charles George Shaw, Clerk of the Peace, solicitor, Ayr.

BANFF.—John Forbes, Commissary Clerk, solicitor and procurator before sheriff and other courts in county and Burgh, exclusive of the courts in which he is clerk.

Do.—John Allan, Clerk of the Peace, solicitor and procurator before sheriff and other courts in county and burgh, exclusive of the court in which he is clerk.

BERWICK.—Robert Romanes, Commissary Clerk, solicitor in London.

Do.—Jonathan Melrose, Clerk of the Peace, partner of the firm of Melrose and Porteous, solicitors, Coldstream.

BUTE.—Daniel Macbeth, Sheriff-Clerk, Commissary Clerk, and Clerk of the Peace, agent, Rothesay.

CAITHNESS.—William Miller, Commissary Clerk, and Clerk of the Peace, Procurator before the Sheriff Court of Caithness.

CLACKMANNAN.—John Ewing, Commissary Clerk, Procurator before the Sheriff Court of Clackmannanshire.

Do.—David M'Watt, Clerk of the Peace, Procurator before the Sheriff Court of Clackmannanshire.

DUMBARTON.—John Denny, Clerk of the Peace, writer in Dumbarton.

DUMFRIES.—Henry Gordon, Sheriff-Clerk, a partner of the firm of Gordon & Whitelaw, writers, Dumfries.

Do.—Christopher Harkness, Commissary Clerk, and Clerk of the Peace, writer in Dumfries.

EDINBURGH.—James L. Hill, Commissary Clerk, W.S., and carries

on business in Edinburgh as a W.S., in partnership under the firm of Hill, Reid, and Drummond, W.S.

Do.—John Gillespie, Clerk of the Peace, W.S. in Edinburgh.

FIFE.—Wm. Horsburgh, Clerk of the Peace, procurator or agent in Cupar.

FORFAR.—David Small, Clerk of the Peace, solicitor in Dundee.

KINCARDINE.—Alex. Gordon Brown, Clerk of the Peace, procurator or agent in Stonehaven.

LANARK.—George Crawford, Clerk of the Peace for Lower Ward, acts as conveyancer in Glasgow, but does not practice before the sheriff or other local courts.

Do.—Wm. Morrison, Clerk of the Peace for the Upper Ward, agent or solicitor in Lanark, and practising as such except in the court of which he is clerk.

Do.—James Gebbie, Clerk of the Peace for Middle Ward, agent or solicitor in Strathaven, and practising as such, except in the court of which he is clerk.

LINLITHGOW.—John Hardy, Sheriff-Clerk, Commissary Clerk, and Clerk of the Peace, general agent and law conveyancer in Linlithgow, but not as an agent or solicitor in any court.

NAIRN.—Wm. Dick, Clerk of the Peace, solicitor or agent, Nairn.

PEEBLES.—William Stuart, Sheriff-Clerk, Commissary Clerk, and Clerk of the Peace, carries on agency business in Peebles with a partner. Remarks: Mr. Stuart in a note says, "Mr. Stuart is Sheriff Clerk, Commissary Clerk, and Clerk of the Peace; he is a partner of the firm of Stuart & Blackwood, Peebles, who transact business as bank agents, conveyancers, factors for estates, assurance company agency, and such like. All business connected with the courts above mentioned is excepted from the co-partnery. Mr. Blackwood has no participation in the salary and emoluments derived from the above offices, and Mr Stuart has no interest whatever in Mr Blackwood's business as a procurator in these courts."

PERTH.—William Young, Commissary Clerk, in partnership with his son, under the firm of W. & W. R. Young, bankers and solicitors, Auchterarder.

Do.—Robert Martin, Clerk of the Peace, solicitor, Perth.

RENFREW.—John Bartlemore, Commissary Clerk, writer, Paisley.

Do.—Robert Wright,* Clerk of the Peace, writer, Greenock.

ROSS.—William Moffat, Clerk of the Peace, partner of the firm of Moffat and Dewar, solicitors, Dingwall.

SELKIRK.—John Lang, Sheriff-Clerk, Commissary Clerk, and Clerk of the Peace, in partnership with another as solicitor or agent in Selkirk. Remarks: Mr Lang states that he has no interest in any court business which may be conducted by his partner before the courts of which he is clerk.

STIRLING.—Thomas L. Galbraith, Sheriff-Clerk, writer in Stirling.

* Mr Wright died after the return was made, and Mr Bartlemore has been appointed to succeed him.

Do.—Andrew Hutton, Commissary Clerk, writer in Stirling, in partnership with another.

SUTHERLAND.—No return.

WIGTOWN.—Alex. Ingram, Clerk of the Peace, Procurator before the Sheriff and Commissary Courts of the county.

ZETLAND.—George Smith, S.S.C., Sheriff-Clerk, conveyancer and practitioner before the Commissary and Justice of Peace Courts, and conducts general business exclusive of Sheriff-Court business.

Do.—Samuel Henry, Commissary Clerk, Procurator before the Sheriff Court, and conducts general business, exclusive of procedure before the Commissary Court.

Note.—Depute or Assistant Clerks in the Sheriff, Commissary, and Justice of Peace Courts, appointed by the Principal Clerks of these courts, and clerks in Burgh and Police Courts are not included in this return. (Signed) T. G. Murray, Crown Agent for Scotland, Edinburgh, 26th June, 1867.

Correspondence.

ANSWERS TO QUERIES.

I.—(Ante, p. 507.) There seems to be no doubt as to the first point here, viz., that no purchaser can be compelled to fulfil a contract of sale of land the title of which is in such a condition as is described. As to the question whether any remedy exists by which the trustees may either safely continue to hold the long lease for the beneficiaries, or may be enabled to give a good title to a purchaser, it occurs to me that a new lease by the proprietor for the unexpired period of the original term is not open to the objection suggested by R. B. For, even if the proprietor were to resume the subjects, there is nothing to hinder him from giving them out again on a Montgomery lease for any period not exceeding ninety-nine years. And if he gives them to the original tenant at the original rent I cannot see that that would be a contravention of the entail because of the rent being less than he (the proprietor) could get for the land together with the villa now erected on it. The alienation of the villa and accessories of the land to the original tenant's representatives at the old rent would not be gratuitous, because, if the proprietor resumed possession of the subjects and ousted them, he would be bound (always assuming their author's *bona fides* in building on the subjects) to recompense them for the outlay on the subjects so far as he himself was *lucratus* thereby. (See Bell's Princ. 538). And there is no reason why he should not take the short way of arriving at the same result without litigation or dispute by letting the lands anew to the original tenant's trustees for the remainder of the original term. For the sake of making the arrangement doubly secure, the new lease might narrate the circumstances in which it is granted and the obligation of recompense, and it might be granted (though I should think this quite unnecessary) with the consent of the substitutes in the entail next to succeed. Indeed, if they are as favourably disposed as the proprietor, the trustees might at no very great expense, if circumstances are favourable, obtain a disentail of the lands embraced in the lease. But surely any purchaser would be satisfied with a new lease in the terms I have mentioned.—G.

Notes of Cases.

THE SHERIFF COURTS.

(Renfrewshire S. D. Court at Greenock, before Sheriff Fraser, July 31.)

Demurrage.—A bill of lading for sugar on board the s.s. Stettin from Dunkirk to Greenock, contained a clause—"à reclamer dans les 24 heurs de

l'arrivée sous peine de payer gardiennage et magasinage." This action was brought against consignees for charges paid by the shipmaster to the custom house authorities for watching sugar and for piling it up in the shed when discharged. The shipmaster founded on the English cases which are thus summarized by Maude and Pollock, *Merch. Sh.* 307 (3d ed.).—"Where the parties enter into a positive contract that the goods shall be taken out of the ship within a certain number of days from her arrival, the contract must be construed strictly, and demurrage becomes payable for any delay beyond the period fixed upon which is not owing to the default of the shipowner, even although it may be caused by an accident or impediment over which the freighter has no control – as, for instance, by the necessity for the removal of superincumbent goods by the crowded state of the docks, or by custom house or government restraints or regulations; and this has been held to be so even although no notice of the ship's arrival has been given to the consignees, or to the indorsers of the bills of lading." Serious doubts as to the doctrine were expressed by Lord Tenterden in *Rogers* v. *Hunter*, 1 Mo. & M. 63, and *Dobson* v. *Droop*, 1 Mo. & M. 441. The defrs. contended that the shipmaster had not been ready to deliver the goods, which were piled up along with sugars belonging to other consignees, and undistinguishable, and that they could not be liable for expenses of watching &c. until their sugars were separated and ready for delivery. But the Sheriff adopted the view stated by the more recent English writers, holding that the question was really one of construction of the contract, which might be so expressed as to get rid of all difficulty. He said: "Don't the words 'à reclamer' just mean that the consignees are to be ready themselves to wait on and select their own packages as they are landed from the ship, just as a traveller would have to wait and receive his portmanteau from the luggage van? And if the customs regulations render it necessary that their goods be watched, is not the contract quite clear that the expense of doing so is to be borne by the consignee?" He thought a proof that the consignees were ready to take delivery of their goods would not be relevant, and decerned against the consignees. We are not aware that there is any reported Scotch case on the subject.

Act.—R. Neill. Alt.—W. M'Clure.

(Forfarshire at Dundee, before Sheriff Smith, Oct. 9.)

Debts Recovery Act—Sheriff-Clerk—Preparation of Summonses.—This was the first Court held for cases under 30 and 31 Vict., c. 96. Last Court day, Mr Paul brought under the notice of the Court the provisions of the Act relative to the duty of the Sheriff-clerk in the issuing of the summonses, and the Sheriff intimated his willingness to consider the matter. Before the business was entered on,

The Sheriff said,—Last Court day a motion was made by Mr Paul that instructions be given to the Clerk of Court that, on receiving a copy of the account to be sued for, under the Debts Recovery Act, he shall fill up and issue a summons for the same. I do not think it my duty to give these instructions to the Clerk of Court, and as the matter is one of public importance, I shall state the grounds of this opinion. It appears that it has been the practice in Forfarshire, Perthshire, and some otner counties for parties who wish to take proceedings under the Small Debt Act to obtain, at the

office of the Sheriff-clerk, by merely presenting a copy of the account to be sued for, a summons—filled up and signed, and ready for execution. This is, no doubt, a very convenient arrangement for the procurators, and, although the Sheriff-Clerk is quite at liberty to continue the practice if he thinks proper, I am of opinion that he is not bound to do so. At common law he is under no obligation to act the part of a solicitor for one of the parties, for the whole theory of his office is perfect neutrality between the contending litigants. He is not required to frame summonses in the ordinary Court, and he must be equally entitled to decline doing so in Small Debt cases, unless the duty has been expressly imposed upon him by the statutes creating the summary jurisdiction. I have been unable to find any such provision in either the Small Debt Act or the Debts Recovery Act. On the contrary, there is abundant evidence that it was the intention of Parliament that the party himself should first prepare his own writ agreeably to the form in schedule (A), and then take it to the office of the Clerk to be there signed by him—"which summons or complaint *being signed* by the Sheriff-clerk shall be a sufficient warrant and authority to any Sheriff-officer for summoning the defenders," &c. A summons, even under the Small Debt Act, is a very formal instrument. It must still set forth, in a tolerably relevant form, "the origin of debt, or ground of action." If the action were thrown out on the ground of any defect, a claim of damages would lie against the procurator or other person who undertook its preparation. And it is not to be supposed that if Parliament had intended these duties to be discharged, or risks to be incurred by a public functionary, it would have abstained from saying so in the clearest terms. But, whatever doubt may be felt as to the true reading of section 3, the matter is made perfectly clear by the terms of section 9, for it is there said that any person wishing to pursue a furthcoming in the summary mode provided by the Act, "shall proceed by summons or complaint, agreeably to the form in schedule D," &c., which summons or complaint is to be afterwards signed by the Sheriff-clerk. The meaning of these words clearly is that the party himself shall frame his own summons in the form appended to the statute. No doubt, by section 25, the Sheriff-clerk is required to appoint, at the seat of each Small Debt Circuit Court, a depute Clerk, "or other proper person resident in the place, to issue the summonses or complaints which may be applied for and issued under the provisions of the Act." This, however, obviously refers to the printed forms of summons, of which the Sheriff-clerk is apparently expected to have a stock on hand ready for public use. It was contended that the Debts Recovery Act assumed that the preparation of summonses would be undertaken by the Sheriff-clerk, for section 18 declared that the fee to be allowed the procurator should cover, *inter alia*, "revising summons." This, however, does not help the argument, but the contrary; for if the Sheriff-clerk prepared the summons, the procurator would have no opportunity of revising it, seeing it would come to him signed and ready for execution. The words rather show that the procurator is to revise the summons before sending it to the office of the Sheriff-clerk for his signature, which is the warrant for serving it on the defender. I quite sympathise with the profession in the feeling that, under the new Act, they have many duties to perform for an insufficient remuneration. It would, however, be only extending this injustice to transfer a portion of these duties to public officials, on whose shoulders Parliament has nowhere said they shall be placed.

THE

JOURNAL OF JURISPRUDENCE.

TO OUR READERS.

THE Publishers have to intimate that from the beginning of the year 1868 the *Scottish Law Magazine and Sheriff-Court Reporter*, hitherto published in Glasgow by Messrs Murray and Son, will be united with this *Journal*. The field in which a professional journal in Scotland must seek for support is so limited that two publications cannot, as experience has more than once proved, be long conducted without pecuniary loss to one, most probably to both. There is not, in a profession probably numbering less than 2000 members, all of whom are engaged in arduous and difficult labour, either writing or reading power sufficient to support two publications of this kind. In announcing therefore this amalgamation, the Publishers venture to express a hope that the absence of competition will prove a public benefit. It will enable them, if they are supported as there is reason to expect that they will be, to make several very material improvements in the *Journal of Jurisprudence*. The main object of the *Scottish Law Magazine* was to furnish accurate reports of the more important cases decided in the Sheriff Courts, and we believe that by the co-operation of many of the Sheriffs and others, the publishers succeeded in carrying out that object. The *Journal of Jurisprudence* has already begun to give reports of decisions in the Sheriff Courts. They have also made arrangements for noticing, with fuller knowledge and sympathy, matters of local interest, especially in Glasgow. They have thus adopted what have been the main features of the *Scottish Law Magazine*. Although the *Journal of Jurisprudence* is naturally conducted in Edinburgh, it will endeavour, as it has hitherto done, to avoid being identified with any metropolitan or professional clique, and its pages will

be open to the free discussion of every subject of interest connected with the law of Scotland and its administration.

The Publishers beg leave to remind their readers that such an enterprise as the *Journal of Jurisprudence* is necessarily carried on under considerable disadvantages. They cannot better describe its position than in the words which they used at the close of the tenth year of its existence, in January last. "It addresses a limited class; its contributors must, almost as a matter of course, be professional men, whose papers are written in the intervals of more engrossing business; and the subjects with which it has to deal are technical, and often very dry. Still, although the Publishers are conscious of many shortcomings, they can look back on the past ten years with some satisfaction. They have succeeded in establishing a legal periodical for Scotland, which has been useful in suggesting, in explaining, or in preparing the way for most of the important legal reforms which have been effected since the commencement of its career, and which has endeavoured to discuss with calmness and impartiality every question of the day interesting to the legal profession. At the commencement of its Eleventh Volume, the Publishers respectfully remind their readers that they may do much to sustain the vitality of such a periodical, not only by obtaining new subscribers, but by suggesting to the Editor such subjects of discussion as may arise within their own experience, and by submitting their own views on such subjects to the public through the pages of the *Journal*. On the part of the Publishers and Conductors, no pains will be spared to make the *Journal of Jurisprudence* (to use the language of its first Preface) 'a useful and complete Compendium of the Law and Legislation of the year; while increasing attention will be paid to the discussion of measures in progress, and reforms contemplated.'

"The 'Digest of Cases' has always been an important part of the *Journal*. Great care will in future be bestowed on the preparation of these brief reports (which will include cases decided up to the 20th of the preceding month); and it is hoped that they may serve the same purpose in Scotland as the 'Notes of Cases' now published by the Council of Law Reporting and the *Law Journal* in England. Among the English cases, those which have a special interest for Scotch lawyers will be more fully reported."

EDINBURGH, *Nov.* 28, 1867.

PROOF OF LOAN IN SMALL DEBT COURTS.

THE Small Debt Court, though often made the subject of ridicule and vituperation, is in reality one of the most useful institutions, and is extremely popular among that large class of the community to whom prompt and inexpensive decisions on the little transactions in which they are engaged are of vital importance. It is emphatically the poor man's court; and as we can hardly fancy how the little trader got on at all before its institution, so we believe there is nothing which he would more deprecate than any enactment by which its present efficiency should be impaired. One of its most characteristic and vital peculiarities is finality. Without this, there might be less apparent risk of injustice, but from the expense inseparable from advocation or suspension, there would be the certainty of much more. At the same time, it is not to be concealed that the want of some means whereby an authoritative direction could be obtained from the Supreme Courts is an evil of no small magnitude, inasmuch as that uniformity in the administration of law—that universality of rule—which is often of more importance than the equity of the rule itself, cannot be secured. In England, this is obtained by means of a "*case*" in which the facts, the law, and the decision, are succinctly stated, and which is presented to one of the Superior Courts for authoritative decision, whenever a question of law arises for which there is no previous rule established. For some unexplained and probably inexplicable reason, the "*case*," like many other useful English expedients, has been hitherto (except in revenue and registration cases, and under one or two not very important statutes) denied to Scotland, and the result is that in many respects the law and practice of our Small Debt Courts present a curious variety, which adds neither to the dignity of the tribunal nor to the comfort of the litigants.

A very remarkable example of this will be found in the law applicable to the proof of loans under £8 6s 8d, which still remains in the greatest uncertainty—some small debt judges allowing such loans to be proved *prout de jure;* while others rigidly reject all evidence but that of writ or oath. Nay, it is said that, until recently, the practice varied in the same Court according to the view of the Sheriff-Substitute who happened to sit for the day. It is unnecessary to enlarge on the great injustice which must of necessity arise from this difference—individuals being led to conduct their transactions on one principle, only to find that they are prevented from enforcing them by the operation of another. The evil is indeed so great as to call for legislative interference, if a remedy cannot be obtained from the Supreme Court. In the meantime, it is curious to note how little authority there is on a matter which must be of daily occurrence, and how even that little appears to be almost equally divided on both sides of the question.

Those who support the view that proof of loan should be unrestricted are ready to argue that, whatever doubt may exist as to proving loans under £100 scots (£8 6s 8d) otherwise than by writ or oath, there is no such "restriction" as to proof of payments of debt or of the loan itself, if otherwise established, since it is well known that up to £8 6s 8d such payments may be proved *prout de jure*. There is no doubt great force in this argument; for if the object of the alleged restriction be the prevention of fraud, it is difficult to see why fraud should be more likely to occur in proving a loan than in proving its payment, or why a contract should not be capable of being established by the same mode of proof, which is admittedly sufficient for its extinction. The authority of Erskine may also be appealed to in support of the view that small loans admit of unrestricted proof; for after laying down the general rule as to proof by writ or oath in apparently broad terms, he adds—"Yet a debt constituted by *mutuum*, when it did not exceed £100 scots, was allowed to be proved by witnesses" (iv. 2, 20), and refers to the case of *The Hammermen of Glasgow* v. *Crawford*, March 5, 1628, M. 2247, 12,408. The case of *Thallane* v. *Orrock*, 1673, M. 12,585, seems likewise to favour this view; but the authority most commonly relied on by the supporters of unrestricted evidence is *Braid* v. *Linton*, 3d March 1858, as reported 30 Scot. Jur., 385. Mr Dickson adopts the same view, *Evid.* § 592. It is also worthy of remark that in England loans as well as payments to any amount may and might always have been proved without restriction except in cases struck at by the Statute of Frauds; and that there is great reason to believe this was also the ancient law of Scotland, until the disuse of trial by jury rendered the admission of evidence at large open to much abuse. Some therefore have argued that the admission of evidence *prout de jure* up to £100 scots, both in loans and payments, is nothing else than the remains of our ancient law. It should not be forgotten that the limit of £100 scots, which so often appears in the old law of Scotland, is not properly represented by the supposed modern equivalent of £8 6s 8d; for this limit first appears at a period in our history when the necessities of the government had not yet debased the currency, and when £100 scots, viewed in relation to the then prices of commodities, was really of more marketable value than the present £100 sterling.

Those who maintain that loans, even of the smallest amount, cannot be proved otherwise than by writ or oath, are accustomed to point to the authority of Lord Stair, who certainly lays down the rule of writ or oath as applicable to all cases, without exception (Stair iv. 43, 4), and also to that of Baron Hume, who supports this view in the most emphatic manner. In reporting the case of *Tarbet* v. *Bennet*, Dec. 22, 1803 (Hume 500), he takes occasion to observe that "It is a known rule of our law that a loan of money, 'how inconsiderable soever the sum, can be established by the writ 'only or oath of party;" and he adds, in a note, that "The case of

"*the Hammermen of Glasgow* may seem to be an authority on the "other side, when the sum does not exceed £100 scots (£8 6s 8d); "but this is the only case to that effect, and it was attended with "some circumstances which might be held to take it out of the ordi- "nary rule." In his MS. Lectures (for the quotation from which we are indebted to Mr Macdonald, the learned author of "A Practical Treatise on the Criminal Law of Scotland"), after speaking of the rule as to writ or oath; Baron Hume adds—"Farther, it makes no "difference, as I understand, in this question of evidence, whether "the sum be great or small, or even as low as £100 scots. 'Tis true "you find a judgment in Durie's Collection, 5th March 1628— "Hammermen of Glasgow—which may seem to be a precedent to "the contrary. But that case was attended with circumstances (as "you will find on consulting the report) to take it out of the ordi- "nary rule." Mr Tait, at p. 307 of the 3d edition of his work on evidence, comments on the decision of "*The Hammermen "of Glasgow*" thus—"In that case a bond had been given for the "money, which had been mislaid, and the witnesses saw the sum "lent, and knew that interest had been paid upon it, which circum- "stances, particularly the last, took the case in some measure out of "the general rule. And even in those circumstances, the decision, "which is of old date, seems not beyond doubt as a precedent." As regards the dictum of Mr Erskine, it has been remarked that he does not give the case, as establishing the existing state of the law on this subject, but merely as showing what at a former period had been decided, and that the mere fact of his putting the statement in the past tense is strong evidence that he doubted its being still a binding authority. With reference to the case of *Braid* v. *Linton*, it is noticed that the report in Shaw and Dunlop is very different from that in the Jurist, insomuch that the decision seems rather to point the other way. It is also said, and every person conversant with the practice in Small Debt Courts will probably indorse the opinion, that when evidence *prout de jure* of small loans is admitted, experience shows the relaxation does not operate beneficially. As to the analogy between proof of payment of debts and evidence of loan, it has been observed that the very number and endless recurrence of ready-money payments in small sales necessitates some relaxation of the rule, but that no such imperative necessity can be pleaded in the case of loans of hard cash, which it is not the policy of the law to countenance.

Such is a short *resumé* of the arguments and authorities commonly relied on by those who respectively take the negative and affirmative of this curious question of Scotch law; and after impartially weighing both, it seems impossible to say which is entitled to the greatest confidence. Probably in this, as in many other instances, the practice has always varied, and the matter can only be definitively settled by legislative intervention, or by some Act of Sederunt, if such a power be still competent to the Supreme Court. It would be obliging

if some of the readers of the *Journal* would favour the public with any views or information they may have on a subject of such practical and even antiquarian interest.

ARE BURGH MAGISTRATES ACTING AS JUSTICES OF PEACE ENTITLED TO ACT AS COMMISSIONERS OF SUPPLY WITHOUT PROPERTY QUALIFICATION?

This question has lately been raised in Forfarshire, and was referred by a General Meeting of the Commissioners of Supply to a Committee, consisting of the Sheriff of the County and the Sheriffs-Substitute at Dundee and Forfar. A very able and exhaustive memorandum prepared by Mr Anderson, the Clerk of Supply, on the one side, and "a statement of the grounds on which the first and second Bailies of Dundee claim to act as Commissioners of Supply," on the other side, were laid before the Sheriffs, who returned the following opinions against the claim, which we are permitted to print. Mr Anderson informs us that he has communicated with the other Clerks of Supply in Scotland, who all agree with him on the subject. We are also politely furnished by Dr Barclay, the Sheriff-Substitute of Perthshire, and the learned and laborious author of many books, with "Notes" on the subject, which go more fully into the general subject of the Qualifications of Commissioners of Supply, and which we also print with some slight abridgment.

The Opinion of Sheriff Heriot.

I. There are two statutes which, superseding all former Acts, now determine who are Commissioners of Supply. These are the Valuation of Lands (Scotland) Act, 17 and 18 Vict., c. 91, and the Commissioners of Supply (Scotland) Act, 1856, 19 and 20 Vict., c. 93. By the 19th section of the former Act it is provided that,—"From and after the passing of this Act, no person, other than a person duly qualified, as after-mentioned, shall be qualified to act as a Commissioner of Supply in any County," &c.

By the first section of the latter Act it is provided,—"All persons qualified in terms of the 19th section of the Valuation Act above quoted, otherwise than by nomination, *ex officio*, for acting as Commissioners of Supply in any County in Scotland, shall, without being named in an Act of Supply, be Commissioners of Supply of such County while so qualified, and shall as such be entitled and have power to vote and act as freely, and to the like effect, as if they had been so named."

II. As will be observed from the 19th section, above quoted, the following are the only persons who are entitled to be Commissioners of Supply, viz :—1. One who is "named as an *ex officio* Commissioner of Supply *in any Act of Supply*." 2. A proprietor of heritable property of £100 a year. 3. The husband of the proprietrix of heritable property of £100 a year. 4. The eldest son of a proprietor of heritable property of £400 a year: and 5. The factor of a proprietor of heritable property of £800 a year.

III. The claim in question depends on whether the said four Magistrates, or any of them, possess or do not possess, any one of these five qualifications. Setting aside the four last qualifications specified, as not properly raised by the terms of the remit, the question for consideration is narrowed to this: Do the claimants, or any of them, possess the qualification which stands first in the above list, viz., Are they, or any one of them, named "as an *ex officio* Commissioner of Supply, *in any Act of*

Supply?" If any of them can refer to any Act of Supply "on the pages of the Statute Book where they are so named," it will be the duty of the Commissioners of Supply to sustain the claim of such of them, but, if none of them can do so, I am afraid that the Commissioners of Supply have no other course open to them than to reject the claims made until, at least, they are established in some competent manner. It does not seem to be enough for the claimants to allege that they are named to be *ex officio* Justices of the Peace, in the *Commission of the Peace*. The question remains, are they named or constituted Commissioners of Supply in any "*Act of Supply?*"

IV. The claim stated on behalf of the claimants is mainly rested on two Statutes, 45 Geo. III., c. 48, sect. 3, and 7 and 8 Geo. IV., c. 75, sect. 2, the first of which enacts,—"That the several and respective persons hereby appointed Commissioners shall be subject and liable to such and the same qualifications," &c.

"Provided, also, that all persons who shall act as Justices of the Peace of or for any County, Riding, Shire, or Stewartry in Great Britain, *being duly qualified as aforesaid*, may act as such Commissioners, although not specially named in this Act."

The second of those Statutes enacts,—"That all persons who shall act as Justices of the Peace for any County, Shire, or Stewartry in Scotland, and also the several and respective persons hereinafter specially mentioned, named and designated, *all such Justices of the Peace*, and other persons, *being respectively duly qualified to act as Commissioners of the Land Tax* within their respective Counties, Shires, or Stewartries, shall be, and they are hereby declared to be, Commissioners," &c.

These, however, are not the Statutes which now regulate the qualifications of Commissioners of Supply. Other and different qualifications have been introduced by the said 19th section of the Valuation Act. The law on the subject is changed by it, and any qualifications that may have at one time existed are now of no avail. The 19th section provides that "from and after the passing of this Act (10th Aug. 1854) *no person, other than a person duly qualified, as after-mentioned, shall be qualified to act as Commissioners of Supply in any County.*" Among the qualifications "aftermentioned," that which the claimants found on, on behalf of "all persons who shall act as Justices of the Peace is not included."

V. Even had the law as to the qualifications of Commissioners of Supply not been changed by the said 19th sect. of the Valuation Act, the acting Justices of the Peace who were, at one time, favoured by the Acts 45 Geo. III., c. 48, sect. 3, and 7 & 8 Geo. IV., c. 75, sect. 2, were only such as possessed a particular property qualification (see sect. 3, which refers for the qualification to sect. 137 of 38 Geo. III., c. 5). Although it is, by sect. 5 of 19 & 20 Vict., c. 93, provided that the list of Commissioners of Supply thereby prescribed to be made up by the Clerk of Supply, on or before the 31st day of December in each year, subject to corrections on appeal,—"Shall, till the next list shall have been authenticated, be conclusive as to the right of acting and voting as Commissioners of Supply, except as regards such Sheriffs and Magistrates of burghs and towns, for the time being, as may, *in any subsisting Act of Supply*, be constituted *ex officio* Commissioners of Supply, without being required to possess any property qualification, who, and whose successors in office, shall be entitled to act and vote as such Commissioners *virtute officii*, and without being inserted in such list,"—there is nothing which dispenses with "a property qualification in any others than Sheriffs and Magistrates of burghs and towns, for the time being, as may, in any subsisting Act of Supply, be constituted *ex officio* Commissioners of Supply."

VI. An *ex officio* Justice of the Peace is not in the same position as a burgh magistrate *named* in an Act of Supply. In the Act of Supply 2 & 3 Will. IV., c. 127, for instance, the following parties are named as Commissioners of Supply:—"The Sheriff of Forfarshire for the time being; the Sheriffs-Substitute of Forfarshire for the time being; the Provost of Forfar for the time being; the Eldest Bailie of Forfar for the time being; the Provost of Dundee for the time being; the Provost of Montrose for the time being; the Provost of Arbroath for the time being; the Provost of Brechin for the time being."

Looking to the case of *Sinclair* v. *Dean of Guild and Bailies of Thurso*, 1st Jan. 1729, Mor. 2435, and to the terms of the Acts 43 Geo. III., c. 150, sect. 4; 43 Geo. III., c. 161, sect. 7; and 19 & 20 Vict., c. 93, sect. 5,—I am of opinion that these parties are entitled to act without any property qualification, but then they are all named in an "*Act of Supply*," while the four Magistrates, on behalf of whom the present claim is made, are not, so far as I am aware, named in any such Act.

The opinion of

(Signed) FRED. L. MAITLAND HERIOT, Sheriff of Forfarshire.

The Opinion of Sheriff Robertson.

I concur in the above opinion.

(Signed) ALEX. ROBERTSON.

FORFAR, *March* 14, 1867.

The Opinion of Sheriff Guthrie Smith.

The question for decision turns upon the inquiry whether the claimants are Commissioners of Supply, *ex officio*, within the meaning of the 19th section of the Valuation Act.

The Act 7 & 8 Geo. IV., c. 75, provides that the following are to be Commissioners, viz.:—First, All persons who shall act as Justices of the Peace for the county. Second, The Right Honourable the Earl of Strathmore; the Right Honourable the Earl of Airlie, and various gentlemen of property whose names and designations are set forth at length. Third, The holders of the following offices for the time being:—The Sheriff-Depute of Forfarshire; the Sheriff-Substitute of Forfarshire; the Provost of Forfar; the Provost of Dundee; the Provost of Montrose; the Provost of Arbroath; the Provost of Brechin.

The Statute also provides (sect. 4) that the Sheriff-Depute, or Sheriff-Substitute, shall be capable of acting without any other qualification; but, as regards all other persons, it is enacted (sect. 3) that the "several and respective Justices of the Peace, and other persons, hereby appointed Commissioners, shall have such and the same qualifications as are required by the Act 38 George III., c. 5,"—that is to say, they must be in possession, or be infeft, in lands of the annual worth of £100 Scots. Nothing is said as to burgh magistrates, but in the case of Sinclair of Fraiswick *v.* the Dean of Guild and Bailies of Thurso, 1st January 1729, Morrison 2485, it was decided by the Court of Session that they also required no landed qualification, which it was held was only necessary in the case of the particular persons who are Justices of the Peace, or were appointed *nomination* Commissioners.

It appears to me, therefore, that, in this county, it is only the Sheriff, Sheriffs-Substitute, and the Provosts of the five burghs, who can be said to be Commissioners of Supply, *ex officio*, in any proper sense of the term. Their title to act is the possession of a certain office for the time being, and whenever they cease to hold it they are no longer qualified. The case of a Justice of the Peace is different. He is not entitled to act *virtute officii;* but, being a Justice, he is entitled to be a Commissioner whether or not his name appears in the list of persons specially enumerated, provided he holds lands of the annual worth of L.100 Scots. His title to act is not the fact that he happens to be in the Commission of the Peace, but that he is likewise in possession of land to the extent stated; whereas the Sheriff, Sheriffs-Substitute, and the Provosts of the burghs, require no such qualification.

That this is the correct reading of the Statute is shown by the fact that, in certain counties, the Bailies of Royal Burghs are expressly empowered to act as Commissioners; but, according to the claimants, these persons are already qualified as Justices, so that, in their view, Parliament has been guilty of a piece of surplusage which never could have been intended. Further, the Provost is as much a Justice as any of the Bailies, and it is difficult to see why he alone was mentioned if it had been intended that his brother Magistrates should be equally entitled to sit as Commissioners of Supply.

For these reasons, I am of opinion that the present claim cannot be sustained.

(Signed) J. GUTHRIE SMITH.

DUNDEE, *March* 15, 1867.

Notes on Qualifications as Commissioners of Supply. By Hugh Barclay, LL.D., Sheriff-Substitute of Perthshire.

The Act of Convention 1667 introduced in Scotland the system of landed qualification for Commissioners of Supply, and was recognised by 1670, c. 3, 1672, c. 5, 1685, c. 12. Nominations are found in the Scotch Acts 1685, c. 12, 1689, c. 32, 1690, c. 6, 9 and 10, 1693, c. 9, 1695, c. 10, and in a long series of subsequent Statutes.

Since the Union the chief Supply Acts for Great Britain are 37 Geo. III., c. 35, 38 Geo. III., c. 5, 26 & 48, 39 & 40 Geo. III., c. 31 & 60, 40 Geo. III., c. 68, 43 Geo. III., c. 150 & 161, 45 Geo. III., c. 48, 7 & 8 Geo. IV., c. 75, 9 Geo. IV., c. 38, 2 & 3 William IV., c. 129, 3 & 4 William IV., c. 95, 6 & 7 William IV., c. 80, 1 & 2 Vict., c. 57, 7 & 8 Vict., c. 79, 11 & 12 Vict., c. 62, 16 & 17 Vict., c. 111. The Act 38 Geo. III., c. 5, sect. 137 (1798) fixed a landed qualification for all Commissioners "appointed by that Act," except the eldest sons and heirs apparent of qualified persons. By sect. 139, "any Provost, Bailie, Dean of Guild, Treasurer, Master of the Merchants' Company, or Deacon, Convener of the Trades for the time being of any Royal Burgh, and any Bailie for the time being of any Borough of Regality or Barony herein named or appointed for putting this Act in execution in any County or Stewartry, or the Factor for the time being of forfeited and annexed estates, shall be capable of acting as a Commissioner for such County or Stewartry." It seems to have been intended, though it is not clearly expressed, to dispense with the landed qualification in the case of these officials. Mr Hutchison (vol. i., p. 350) thinks that the officials mentioned in the Statute are exempt from property qualification. The Act 38 Geo. III., c. 5, expired in 1805, but is referred to in all subsequent Statutes as fixing the standard of qualification for the office of Commissioner of Supply. Another of the same year (c. 48) introduces and enforces a personal property qualification, but which apparently applies only to cities and English counties. By a third Act of the same year (c. 60) the Land Tax was made perpetual, and measures were provided for its redemption. But this Act does not contain any new provisions as to Commissioners. The Act 43 Geo. III., c. 150 (1803), sect. 4, with the exception of the Sheriff and Sheriff-Substitute, requires under a penalty the qualification appointed by 38 Geo. III. 43 Geo. III., c. 161, sect. 6 & 7, with a similar exception, requires the same qualifications in Commissioners. The Act 45 Geo. III., c. 48, names both for England and Scotland; and for several counties there are nominations of Commissioners *ex officio*. There is added to *all the nominations and appointments* the words, "*being duly qualified* to act as Commissioners of the Land Tax, in pursuance of the orders and directions of the Act 38 Geo. III." But sect. 3 provides "that all persons who shall act as Justices of the Peace of or for any County, &c., in Great Britain, being *duly qualified as aforesaid*, may act as such Commissioners, although not specially named in this Act." A similar clause is repeated in 45 Geo. III., c. 48, sect. 8. The plain meaning of this clause is, that all persons either personally named or appointed as holding office must be duly qualified, and, in addition, all acting Justices of the Peace, though not named, are, if also duly qualified, Commissioners of Land Tax. The object rather appears to be, that acting Justices *ought* to be named (and generally were so), but in case of any omission such Justices should be held as "*named*." There is no clause dispensing with their qualification, but the very contrary. An opposite view would lead to this anomalous result that a Justice *named* in the Act, and sitting in virtue of his nomination, would undoubtedly require the landed qualification; but to one not named in the Act, and sitting in virtue of his office as an acting Justice, the qualification would be unnecessary. Mr Burn (Chitty's Edition, 1845, *voce* "Taxes,") says, "all Justices of the Peace *duly qualified* may act as Commissioners of the Land Tax," and refers to the Acts above cited.

The Act 7 & 8 Geo. IV., sect. 75, (1827), reciting 38 Geo. III., c. 5, is nearly in the same terms as the 45 Geo. III. In almost every county list in Scotland it adds several Commissioners *ex officio*. But such official appointments are rare in the lists applicable to England. The plain reading of the Statute, like the former, is, that all Commissioners, either in virtue of special individual or official nomination, and acting Justices generally nominated, must be duly qualified under the prior Statutes, unless, perhaps, by some of the Statutes specially excepted, as may be plausibly maintained for Sheriffs. The Act 9 Geo. IV., c. 38, (1828), recites the 7 & 8 Geo. IV., c. 75, and repeats in some counties the nomination clauses with additional names. But it expressly (sect. 2) requires the same qualifications in all the several persons appointed by the previous Act and this Act, as were required by the Acts 38 Geo. III., c. 5 & 48. An indemnity is provided (sect. 4) for those who have acted without being properly *named* in the prior Act, but not for those who may have acted *without qualification*.

The Act 2 & 3 William IV., c. 127, (1832), has the usual condition annexed,—"that the several and respective persons hereinafter *named* shall and may, and are hereby empowered and authorized (*being duly qualified*) to put in execution the Acts 7 & 8 Geo. IV., c. 75, and 9 Geo. IV., c. 38." The next nomination Act, in similar terms, is 3 & 4 William IV., c. 95, (1833), and is followed by the Acts 6 and 7 Wil-

liam IV., c. 7, 1 & 2 Vict., c. 57, 7 & 8 Vict., c. 79, 11 & 12 Vict., c. 62, and, finally, 16 & 17 Vict., c. 111, (1853),* and the last of the series (so far as regards Scotland) contains the usual provision as to the persons named "*being duly qualified.*" During the period embraced by the nomination Acts the selection of official Commissioners varied in different counties. In some counties many more holders of office were included than in others, and in some the clause from the Act 38 Geo. III. was repeated so as to include all persons acting as Justices of the Peace for the county.

The Valuation and Commissioners' Acts 1854 and 1856 (17 & 18 Vict., c. 91, and 19 & 20 Vict., c. 93), which raise the present question, introduced into Scotland a much more judicious mode of annually making up the list of Commissioners, so that nomination Acts are no longer required. The first of these Acts (sect. 19) declares the qualification for Commissioners of Supply to be "*the being named as an ex officio Commissioner in any Act of Supply*," or having certain defined interests in lands and heritages within the county. The second Act provides for making up an annual list of Commissioners appearing as qualified according to the Valuation Roll, "*otherwise than by nomination ex officio.*" The fifth section provides for making up an annual list of Commissioners in each county which is declared to be conclusive, "except as regards such Sheriffs and Magistrates of burghs and towns for the time being, as may in any subsisting Act of Supply be constituted *ex officio* Commissioners of Supply without being required to possess any property qualification, who and whose successors in office shall be entitled to act and vote as such Commissioners *virtute officii*, and without being inserted on such list." The amending Act 20 Vict., c. 11, does not affect the question. "*Acting Justices of the Peace*" are not mentioned in the excepting clause, while Sheriffs and Magistrates of burghs are expressly excepted.

The question is of more extended application than the now very limited scope of the Land Tax. All the duties which formerly devolved on the Freeholders were by the Reform Act (2 and 3 William IV., c. 65, (1833), devolved on the Commissioners of Supply, who as such are Commissioners for executing the assessed Tax Statutes, and have the management of County Police, and other such matters.

It may be argued that all who before 1856 were officially entitled to act as Commissioners of Supply without property qualification are still entitled so to act; and that the mention of Sheriffs and burgh Magistrates in sect. 5 does not derogate from the right generally recognised in the first section, seeing that rights and jurisdictions are neither conferred or withdrawn by inference or implication. On the other hand, the officials specially mentioned in sect. 5 may be held to have been, in the view of the Legislature, the only officials at that time exempt from property qualification. The Acts 43 Geo. III., c. 150 & 161, expressly exempted Sheriffs from the qualification distinctly required from all other Commissioners, and this exemption appears still to exist unless it can be held to be inferentially repealed by subsequent nomination Statutes, in which they are appointed, along with all the others, with the uniform provision "*being duly qualified;*" a condition which is perhaps applicable only to *persons named*, and not to those *appointed* in virtue of office. If the Act 38 Geo. III., c. 5, sect. 189, intended the officials therein specially mentioned to be exempt from the qualification, they appear to have the same dispensation now as then. But the only right conferred on "acting Justices" is in 45 Geo. III., c. 48, and 7 & 8 Geo. IV., c. 75, which merely authorised them, "being duly qualified," to act as Commissioners without being specially named. It would appear that the Acts 17 & 18 Vict., c. 91, and 19 & 20 Vict., c. 93, could not, and did not, confer on them any higher right than they formerly possessed. If they were previously entitled, in virtue of their office, to act as Commissioners without landed qualification, then assuredly these Acts did not abrogate but rather confirmed their right. But as this qualification was previously necessary, it follows that neither of these Acts did away with this necessity or conferred on them any higher right than they previously possessed.

The only authority in Scotland bearing on the question is *Sinclair* v. *Dean of Guild and Bailies of Thurso* in 1729, Mor. 2435, 8672. The action was to recover the penalty from the defenders for acting as Commissioners of Supply without possessing the requisite qualification. The defenders were found not liable, for the Lords *thought* that these qualifications related only to the particular persons' *nominatim* appointed Commissioners, and not to those appointed *virtute officii*. This decision was prior to the

* 20 & 21 Vict., c. 46, names Commissioners for Sutherland alone. 26 & 27 Vict., c. 101, and 29 & 30 Vict., c. 59, though stated in the Index to apply to Great Britain and Ireland, are confined to England and Wales.

Acts introducing "acting Justices of the Peace" as Commissioners, and leaves the question open as to them.

In Forfarshire a claim was lately put in on behalf of certain Bailies of Royal Burghs, who, as such, are Justices of the Peace, to have their names added to the Roll of Commissioners of Supply, although not having the landed qualification. The Commissioners remitted to the Sheriff and the two Sheriffs-Substitute, who united in an elaborate opinion adverse to the claim. The question is of wider scope now than in former times. At one time few were on the Roll of Justices, except those entitled to be so in virtue of office, who were not also on the Roll of Commissioners of Supply; but now, though the property qualification is so greatly lowered in value, many are Justices who are not qualified to be Commissioners. If the burgh magistrates be right in their contention, all such parties have an equal claim so soon as they qualify themselves by acting. But a question will still remain, what is the necessary amount of action necessary to raise a Justice from dormant to active life? Will one, two, or three acts be sufficient, and in what sphere of duty and how to be proved? Will the exercise of voluntary jurisdiction, as in taking an affidavit, qualify; or must it assume the more formidable aspect of wielding the sword of justice over some unfortunate robber of a turnip field, or still more criminal shooter of a hare or partridge. H. B.

NOTES ON A JUDICIAL SCANDAL.

"What naturally most strikes the Edinburgh mind is that the court performs its function badly; but in England the feeling must be that it has no adequate function to perform. If we are to assume the new causes to number 1,100 a year, we may safely assume the defended causes, which should occupy the court, not to number 700. Jury trials are not well managed in Scotland, and are ruinously expensive, in consequence of which there are comparatively few of them, and we venture to say that they have never in any year exceeded seventy. The disposal of seven hundred causes, issuing in seventy jury trials, we may accordingly assume as the function of the Court of Session, occupying thirteen judges and fifty-eight other persons, at a cost of £65,000. Now, is this function an adequate one? Let the answer appear from the judicial statistics for England.

"The Courts of Queen's Bench, Common Pleas, and Exchequer have between them fifteen judges, being only two more than officiate in the Court of Session, and this is the work they performed last year. In the three courts there were issued altogether in the year 1866, 133,160 writs of summons, and 533 writs of capias, in which processes there were 38,410 appearances. 42,316 judgments were pronounced, and 3,114 cases were tried at Westminster and entered for trial at Nisi Prius on circuit. Of 1,752 cases entered at Nisi Prius, 1,216 were tried on circuit. To take the courts in detail, there were issued in 1866 in the Court of Queen's Bench, 43,146 writs of Summons and 188 writs of capias; the appearances were 11,947, and there were 14,060 judgments; in the Court of Common Pleas, 38,771 writs of summons and 161 writs of capias, the appearances being 13,236, and the judgments 11,405; in the Court of Exchequer, 51,243 writs of summons and 184 writs of capias, with 13,227 appearances and 16,851 judgments. The arrears of business in the courts are trifling, and the amount of new business constantly increasing. Thus it appears that fifteen judges in these courts transact something like a hundred times the amount of business that it transacted by the thirteen Scotch judges; and that the year's business of the Court of Session would not occupy *one* of these courts for much more than a single term. Does not this suggest that the Court of Session requires not only to be put in good working trim, but also to be shaped and proportioned to the amount of business it has to perform?

"How the Scotch judges, with so few cases before them, occupy their time puzzles the English lawyer till he studies the details. Much of their time is lost in trifling work which in England falls to the clerks of court, and in unnecessary speeches from the bench. For the rest their time is simply not occupied in public business at all. The costly court sits only for half of the year. In the Inner House the judges, eight in number, sit nominally from eleven o'clock till four o'clock, with a break of from half an hour to three quarters of an hour for luncheon; practically

the hour for commencing business is from a quarter to half an hour later than the nominal one. They do not sit at all on Monday, and on Saturday sit only from eleven o'clock till two o'clock. In the Outer House five judges, in four courts, officiate for four days a week only, each having a full holiday in addition to Monday blank and Saturday a half-holiday! The hours of attendance are from ten o'clock till between two and three o'clock. In England the judicial position is nowise so easy. Our judges, who do much civil business on circuit—a thing unknown in Scotland—are occupied for fully three-fourths of the year. They have no blank days, and their hour for commencing business is ten o'clock.

"That the thirteen judges of the Court of Session have not long since run out of employment is thus seen to be due partly to their working a bad system, and partly to their not working at all. It is to be hoped that now the evils arising from their arrangements have been frankly admitted, they will be speedily remedied. An end cannot be too expeditiously put to so costly a public scandal."

The following are some notes upon Lord Ormidale's Address to the Juridical Society and the article thereon, headed "A Judicial Scandal," which recently appeared in the *Pall Mall Gazette*, and the most important passage of which is quoted above :—

1. *Number of Reclaiming Notes.*—When Lord Ormidale stated that eight reclaiming notes might be presented in the pettiest case before the merits could be looked at, and ten such notes altogether before the case could be disposed of, he should have added, to prevent misapprehension, that so many reclaiming notes, though possible in theory, were never in practice, in any case presented. The *Pall Mall's* calculation of the number of *speeches* which there might be in a case, founded upon his lordship's statement, though correct arithmetically, is a *reductio ad absurdum* of the statement itself. itself. Great as is the palavering in the Courts, it is far from being so great as these figures would indicate.

2. *Time lost through Reclaiming Notes.*—The *Pall Mall Gazette* seems to be aware that we always have arrears of business in our Courts, but not how great these arrears have in recent times been. Some idea of the arrears may be got from a print in a case before the Court last session. The action was raised in 1851. The record was closed 7th July 1852. The first interlocutor touching the case was pronounced 17th June 1853. It was reclaimed against, and adhered to 22d Feb. 1854. After various proceedings an interlocutor was again pronounced by the Lord Ordinary 20th Nov. 1855. This was reclaimed against, and dealt with by the Inner House 10th Dec. 1857! On the 8th June 1858 another interlocutor was pronounced in the Outer House, which was disposed of in the Inner 7th July 1859. There were, subsequently, two separate judgments of the Lord Ordinary, the reclaiming notes against which appear to have been sent to the Summar Roll. The case finally got into shape to proceed to the House of Lords in July 1863, after being eleven and a half years in the Court of Session, about four of which were lost through the arrears of business in the Inner House preventing reclaiming notes being speedily taken up! The second note was not taken up till after a delay of two years. What time was lost in this case through the arrears in the Outer House, which between 1853 and 1863 were considerable, cannot be ascertained.

3. *Amount of Business the Court has to perform.*—The case made against the Courts by the *Pall Mall Gazette* is exceedingly strong, yet not so strong as it might have been. Having taken the trouble to examine the calling lists, Outer House Rolls, and Hand Rolls for a year, we find the conjectures of the *Pall Mall* to be more favourable than the facts. The year we examined is that from the box-day, April 20, 1865, to the end of the winter session 1866. The number of causes appearing on the calling-lists for that year was 1186, being close on Lord Ormidale's number. Of these only 1096 entered the Outer House Rolls. Of the 1096, again, 605 were *undefended* and only 491 *defended*.* The number of causes that went to trial in that year we cannot ascertain, but believe not to have exceeded 30. From the last parliamentary returns of the business of the Court,† we find that the number of causes tried by jury was 25 in 1859 and 30 in 1861. The *Pall Mall Gazette* allowed us the benefit of the supposition that the defended causes numbered 700 and the jury trials 70 whereas in the year 1865-66 there were only 491 defended causes, and probably not more than 30 jury trials.

4. *Age of Cases in the Court.*—It is absolutely impossible, in the absence of judicial statistics, to say what the average age of a case at judgment may be. All we can say is, that it lies somewhere between the age of *Donaldson* v. *Findlay, Bannatyne & Co.*, which was raised in 1827, and settled *by compromise* in the spring of 1867, in its 40th year; and the age of a case we fancy we have heard of, which went its full course from inception *viâ* a trial without a jury to a judgment, all in ten weeks, in the court of Lord Kinloch.

5. *The Hours of Sitting.*—The only error in the statement of the *Pall Mall Gazette*, as to the hours of sitting, occurs in the following sentence regarding the Judges in the Inner House,—"They do not sit at all on Monday, and on Saturday sit only from eleven o'clock till two o'clock." This ought to read,—"They do not sit at all on Monday, and on Saturday sit only from a quarter after eleven to one o'clock."

* In some cases, defences are put in after the case appears in the undefended roll; in other cases, which appear in the defended roll, there are no proceedings. What the number of each of these two classes may be there are no means of ascertaining. We think they may fairly be set off against one another.

† Why have these returns been discontinued? None seem to have been issued since 1862. In the year 1st Jan. 1860 to 1st Jan. 1861 the number of causes enrolled was 1282; in the year 1st Jan. 1861 to 1st Jan. 1862 it was 1126. In the year examined by us ending 20th March 1866, the number enrolled was 1096. Last year it was probably not over 1000.

Reviews.

The Debts Recovery (Scotland) Act, 1867, with the Incorporated Sections of the Small Debt Act, with Notes and a Practical Digest. By JAMES BADENACH NICOLSON, Advocate. Edinburgh: T. & T. Clark.

THE opinion expressed in the two previous numbers of the *Journal*, in regard to the defects of this Statute, has already been homologated by the practitioners in almost every Sheriff Court in the country. We believe that longer experience of its working, or rather of the impossibility of its being worked satisfactorily, will enable us to add, in an early number, to the already long catalogue of examples which we have given of its blunders and omissions. But in the meantime the Act is in actual operation, and it seems idle to expect that it can be overlooked, or be allowed to remain a dead letter, as we believe has been proposed in one large county, so long as it is competent to allow no other or higher fees or expenses for actions of the nature and amount to which it relates, than those prescribed by its 18th section, although such actions shall be brought in the Ordinary Roll (see § 36 of Small Debt Act—incorporated with this Act by § 5).

The profession will accordingly welcome any manual which can be taken as a guide to a sound view of the puzzling provisions of the new Statute, and which, leaving out of sight the intentions of the promoters and framers of the *Bill*, deals solely with the terms of the *Act*. There can be no doubt that Mr Nicolson's publication will afford valuable and much-needed assistance to all who are engaged in the practice of the local courts. It consists (1.) of the Act itself, so arranged that the incorporated clauses of the Small Debt Act are to be found each in its appropriate place; (2.) of explanatory footnotes appended to the several sections; and (3.) of a digest of the whole provisions of the Statute, compiled so as to afford a complete view of its practical working.

Nothing need be said of the great convenience of interweaving the borrowed clauses of the older Statute with those of the leading enactment. The footnotes are not very numerous, but they are thoroughly practical, and are well arranged and free from ambiguity. We confess that in some cases we should have preferred a little more decision in the mode of dealing with some of the manifest defects of the Statute. For example, it seems a pity to say that "it would probably not be safe to sequestrate under it *currente termino*," —when the learned annotator, as well as every professional man who reads the Statute, must be well aware that it is not only "probably unsafe," but absolutely incompetent, to raise any such process under it. Until there shall be decisions of binding authority on the

many doubtful clauses, it is natural and proper that the author of such a manual as this should refrain from pronouncing a decided opinion upon them. Still, it would have been satisfactory if Mr Nicolson had furnished the profession with his opinion in regard to some of them. The 9th section provides that the note of evidence shall be taken by the Sheriff "with his own hand, or he may dictate it to *a clerk*." To this a note is appended in these terms—"not necessarily the Sheriff-clerk or his deputy." But a more necessary explanation is,—at whose expense "a clerk" is to be provided. In the "Digest," p. 53, it is said that "the provision in the present Act is to enable the Sheriff, whenever he shall choose, to employ an amanuensis, but as it is only to suit his convenience, it is not intended to throw the burden on the Sheriff-clerk." This view of the clause leaves the expense to be borne either by the Sheriff himself, or by the parties. But it has never yet been heard of that a Sheriff had, out of his meagre salary, to furnish clerks to do public work, and "the parties" may with much force found upon the succeeding clause, which provides for their having the luxury of a shorthand writer, at the expense, in the first instance, of the party moving for it, as showing that it was not intended that they should pay for the Sheriff's "amanuensis" when the evidence is taken in the ordinary mode of writing. It is to be feared that there is here a dubiety of expression which may lead to unpleasant discussions, especially in the smaller local courts. More than one example might be given of the same sort, in which an examination of a doubtful expression, or at least an indication that there is room for doubt, might have been expected from the author. To give one instance more:—Are the days within which an appeal is competent to the Sheriff to be calculated as exclusive or inclusive of the day on which the judgment appealed from was pronounced? The words of the Act are "within eight days." The word "thereafter," which occurs in the Sheriff Court Act, has been omitted. Notwithstanding these defects, however, and others which might be specified, the author has in his notes afforded most valuable aid to the interpretation of this Statute, and cleared away in a thoroughly able and practical manner many of the difficulties which have hitherto been supposed to beset its satisfactory working.

Of the "Digest" we can speak in equally high terms of commendation. It opens with a commentary as satisfactory as is, at present, and, in a work of this size, possible, on the clause which limits the operation of the Act to "certain debts," and the author then proceeds to trace an action through its various stages, from the first appearance of the parties before the Sheriff-substitute to its final disposal by the Sheriff-depute or the Court of Session. Each section of the Digest is complete in itself, and the whole is expressed with such admirable precision, and in language so free from unnecessary technicalities, as to give the work a value to the merchant or trader who chooses to conduct his cases without professional assistance, as great as to the Sheriff-court practitioner.

A good practical suggestion is made which we should think must, almost of necessity, be adopted at least in counties where the Sheriff-depute is non-resident. The Act provides that all interlocutors (except the final one which is to contain findings in point of fact and law), shall be entered in the "Book of Causes" in a column set apart for that purpose. If the interlocutors are to be recorded nowhere else, it is plain that the greatest inconvenience would arise, as the only proceedings which could be transmitted to the appeal judge, besides the summons and note of pleas, are contained in the "Book." But it is difficult to see how the business of cases not under appeal can be proceeded with in the Sheriff-court in the country, if the "Book" must in every case of an appeal be transmitted to Edinburgh. It is plain that if that course is the only competent one the "Debts Recovery Roll" would speedily come to a dead lock. With this difficulty in view, Mr Nicolson suggests that all "interlocutors should be written also"—that is, as well as in the Book of Causes—on the same paper with the Note of Pleas, &c. "There is nothing in the Act," adds the author, "to prevent this, and it would be convenient if the case were appealed." The short experience of the Act has already shown that cases under it will be appealed quite as frequently as in the ordinary roll, so that it is plain that some arrangement such as that suggested must be adopted, if this form of process is to be used at all.

While thus able to commend the Digest as a whole, and to assure our readers that it contains many valuable explanations and hints, we feel bound to indicate one portion of it as in our opinion misleading. The author has arranged his remarks under the heading "Hearing," into two parts—(1.) "First Diet;" (2.) "Second Diet." He admits that these terms are not statutory, but adds that they "are used to indicate that the Act contemplates two appearances only as the normal occurrence under it." It is already found in practice, whatever was "contemplated," that more than two appearances are, in almost every contested case, absolutely essential for the ends of justice. Thus,—at the first appearance the pleas are stated, of which one or more may be preliminary. The pursuer desires time to reply on these preliminary defences, which are new to him. At the second appearance, the parties are heard, and the case is adjourned for judgment. At the third, judgment is given, and (it may be) proof allowed. At the fourth, proof is led; and, in the ordinary case, at the fifth appearance, parties are heard on it, while on a sixth enrolment only can judgment on the merits be given. Several more adjournments besides those above noted may be necessary in many cases; those mentioned will certainly be essential in almost all. It seems a pity that the learned author of this Digest, borrowing the phraseology of another tribunal, and of a separate jurisdiction, should have allowed himself to sacrifice a statement of the actual and necessary practice under the Act, to a mere neatness of division, for which no warrant can be found.

On the whole, however, and in spite of this flight of fancy, of which

we see no other specimen in the treatise before us, it is satisfactory to be able to say that the task which Mr Nicolson proposed to himself of assisting the legal profession and the public to understand the "Debts Recovery Act" has been thoroughly well done. We can have no doubt that this manual will of necessity find its way into the hands of all Sheriff-court practitioners. Its value will not be diminished in their eyes by the fact mentioned in the prefatory note, that in its preparation the author was assisted by an experienced Sheriff-clerk-depute in one of the largest counties. Would it not be well that gentlemen of such practical experience as Sheriff-clerks and their principal deputies should be called in to render assistance not only at the compilation of digests, but at the framing of enactments of the class to which the Debts Recovery Act belongs?

The Parliament-House Book for 1867-68. Compiled by WILLIAM BURNESS, Printer, Edinburgh. Forty-third Edition. Edinburgh: William Burness, 2 North St. Andrew Street.

This useful serial is distinguished this year by a complete revision of the Digest of Outer House practice, in which the statutory provisions are now arranged in alphabetical order under the appropriate heads. New cases of practice are carefully noted, and the practical statutes of the year are added—viz., the Debts Recovery and Trusts Acts. We observe also that the important new provisions as to stamps on insurances are carefully inserted. Altogether it is as complete a lawyer's diary and *vade mecum* as could be wished for.

The Month.

The Court of Session has resumed the labours of the Winter Session. The principal effort of the judges will be no doubt to reduce the heavy list of arrears on the Ordinary Rolls of the Divisions. The Summar Rolls were reduced to proper dimensions last summer. Much time is still wasted by the practice of stopping the Second Division and bringing Lord Barcaple from his own Court to make up a bench of nine judges for the ostentatious mummery of the Teind Court. In January last, we called attention to the fact that the cessation of the business of two of these Courts was quite needless, as the quorum of *five* in the Teind Court can be made up by calling one judge from the Second Division, leaving a quorum there to proceed with its proper business, and leaving Lord Barcaple a few hours more for the heavy work of his own Court. Another obstruction has been caused by the hearing, before the whole Court, of a company case of no very extraordinary importance for more

than the half of four working days. When an English journal can draw the contrast between the work done by the Courts on the north and those on the south of the Tweed which we quote elsewhere, it is unfortunate, if not reprehensible, that the short time devoted to the judicial work of the Court of Session should be curtailed, without the strongest necessity. In the present head of the Court we have a man not merely of the strongest intellect and most extensive legal acquirements, but one who has proved himself a most enlightened law reformer and most capable administrator. Surely such improvements as are within the competency of the Court itself—and there are many such—need only to be brought under his notice to receive the encouragement and furtherance of his influence.

Introductory Addresses.—Lord Ormidale and the Dean of Faculty.—The address of Lord Ormidale, delivered to the Juridical Society of Edinburgh, has excited various emotions in the breasts of lawyers. Some, who are, from circumstances or from constitution, averse to change, shudder at the very idea of a judge standing up before the public and announcing as a fact that "the discontent and dissatisfaction arising from the great expense, delay, and uncertainty attending the administration of justice" in the Court of which he is a member, "*amount to a public scandal.*" The learned and excellent judge who presides over one division of the Supreme Court, and who was present during the delivery of the address, expressed at the close his dissent from some of the views enunciated; but, if rumour is to be believed, some would have had him take the far stronger measure of rising and leaving the room when this revolutionary and almost blasphemous sentence was uttered. The Lord Justice Clerk, however, is a high-spirited and a liberal-minded gentleman; who, while ready himself to defend his honest opinions, would not restrain or resent the free utterance by others of theirs.

We have no sympathy with the outcry which has been raised in legal coteries, because Lord Ormidale has spoken his mind as to the judicial machinery which he is employed in working. We differ, perhaps as widely as any of his detractors, from most of the views which he states and the remedies he proposes; but we think him well entitled to the honour and credit of courageously attacking a huge evil. People say it is not decent that a judge should point out the defects of any part of the system of law which he administers. But this we conceive is an old world notion,—that a judge should be shut out from the privilege of a man to take a part in anything that is for the good of the public. Whenever, as in this case, efforts from without fail to effect a reform because of the number and power of opposing vested interests, it seems to us not merely the right but the absolute duty of those whose position gives them knowledge of the evil and power to awaken attention to it, that they should give the public the benefit of that knowledge and power. To prohibit a judge from pointing

out the short-comings either of the law or of the courts, would be as absurd as it would be to forbid the ministers of the Crown to suggest reforms in the state, or the engineer of a steamer to point out a defect in his engines till the boiler bursts and the ship and all its passengers are blown into the air.

That loud complaints of delay and expense, if not of uncertainty, have been made against the Court of Session from every corner of the land, only a very bold or a very ignorant man can deny. That repeated exposures have been made and discussion after discussion raised, always in vain, is in the knowledge of every one of our readers. And but three years have passed since Lord Advocate Moncrieff, with much courage and no success, introduced a bill into parliament for the radical reform of the system of pleading in the Court of Session. It is also undeniable that the most conflicting opinions are entertained as to the cause of the deficiencies complained of in our judicial system and the appropriate remedy. All these things seem to justify us in asking for light even from oracles so seldom audible as lords of session.

The intervention of a judge is therefore peculiarly appropriate in this case, not only because of his special knowledge of the subject matter, but also and chiefly because, whether he advise rightly or wrongly, his summons to set the house in order may perhaps be attended to when the warnings of smaller persons would be disregarded, and when even the well-intended efforts of a liberal Lord Advocate have failed.

We cannot at present enter fully on the merits of the subject which Lord Ormidale has presented for discussion. A more suitable opportunity for doing so will occur at the beginning of a new volume, when we hope to address a much larger audience on a subject of such importance as already to have called forth the comments of the London press.* In the meantime, we recommend the address of the learned judge to the careful consideration of our readers, only pointing out that it fails to supply the great want in any movement for reform of the Court of Session—motive power. No one who has lived a few years in Edinburgh can fail to discover the extraordinary sanctity with which many inhabitants of that city strive to invest the judicial institutions by which they live. It is something gained that this imaginary sanctity should be dispelled, and the naked deformity of the idol unveiled by one of the high-priests of the shrine. But we wish that Lord Ormidale had pointed out how to interest the public at large, and especially the legal profession in the country, in the well-being of the Court of Session. At present, with the exception of a small and select body of litigants whose suits by various reasons are excluded from the Sheriff Courts, and a few close corporations in Edinburgh, no one is interested in the Court. In England it is quite different. An attorney in the

* In another article we offer some notes on points in the address of Lord Ormidale, and the article of an English critic in the *Pall Mall Gazette*.

remotest village of Cornwall or Northumberland may conduct an action for his client in the Courts of Westminster. In Scotland every man who has not an Edinburgh agent is guided by the advice of a lawyer, whose interest it is to dissuade him from litigating in the Court of Session, because he is not allowed any payment for the trouble he may be put to in such a law-suit. The decisions of the Court and the rules of auditing, framed as they very properly are with the view of preventing suitors from being saddled with the costs of two agents, often operate very harshly against country agents who may have taken pains in the preparation of a case. We are strongly impressed with the opinion that a thorough reform of the Court of Session, in whatever way it is to be effected, must either follow or accompany a measure revising the Procurators' Act, and conferring on all the procurators of Scotland the right to conduct their clients' cases in the Supreme Court. This most needful reform could be effected, we believe, by an Act of Sederunt, for the monopoly of the bodies now practising as agents in the Supreme Courts, flows, so far as we are aware, from no higher source. It is to be feared, however, that such an exercise of the inherent power of the Court can hardly be hoped for. It would offend too many deeply-rooted prejudices and clash with too many fancied interests. We are convinced, however, that it would in no way affect the *real* interests of the highly respectable and most useful corporations now practising as agents in the Supreme Courts, which will always, by their high education and character, and the prestige which their membership necessarily confers, maintain a high and advantageous position in the legal profession As in England at present, few country lawyers would think, even if they had the right to conduct a cause without an Edinburgh agent, of coming to Edinburgh to attend to a case, except sometimes at an important hearing. They would employ their Edinburgh correspondents, who would have to surrender so much of the fees as are *really earned* by the country agents, but would be much more than reimbursed by the enormous influx of business produced by the revival of free trade and general confidence. This question, however, is too large and too much involved in details to be discussed in this incidental manner; but it appears to be so vitally connected with the question of reform of the Court of Session, that we cannot refrain from calling attention to it.

The singularity of the circumstances and the magnitude of the subject have compelled our attention to the address of Lord Ormidale, with only one sentence of which we can thoroughly agree. We turn with pleasure to the address of Dean of Faculty Moncrieff to the Scots Law Society, a speech pervaded by even more than the great orator's accustomed grace and power, and full of wise counsel and condensed wisdom. Of many passages which we would gladly transfer to our pages, we have room for only two.

THE HOUSE OF LORDS AS A SCOTCH COURT OF APPEAL.

"It is not wonderful that, take it all in all, Scotland has derived many advan

tages from its labours. But while all this is no more than the truth, our gain would be all the greater if the conviction were more constantly present to the appellate mind, that in these cases it is the law of Scotland only which the House is called on to administer, and that the law of England is at almost every turn not only not identical with but repugnant to it. I remember a distinguished friend of mine at our bar examining a witness in a right of way case who had spoken to a ticket put on the disputed road with the words 'No road this way.' 'But,' asked my friend of the wisness, 'Did you ever know that done when there was not a road that way?' So I never hear the too familiar formula in those august precincts, 'the law of England is so and so, and we are not satisfied that the law of Scotland is otherwise," without being sure that there was no road that way; and that if the law of England pointed in one direction, the chances were very great that the law of Scotland lay in another. So different is the law of England in its spirit and essence—as in the whole law of contract, for instance—that it is quite as likely to mislead as to lead; and an English lawyer should never approach the solution of a question in Scottish jurisprudence without bearing this clearly in mind. Sometimes, also, the English analogy itself plays false to the judicial mind, even in those exalted regions, spreading confusion and dismay in the Parliament House. A striking and instructive instance of this occurred in the well-known case of Duncan and Findlater, as to the liability of trust funds for the consequence of accidents caused by the negligence of trustees. Following the principles and authorities of the law of Scotland, the Court of Session held that the trust funds were liable; but their views were overturned in the House of Lords on the analogous rules of the law of England, and much grave ridicule and sharp remark was directed against the erroneous opinions of the Court below. But the Court of Session has been amply avenged, for little more than a year ago up rose Lord Westbury in the House of Lords, and ruled conclusively that the learned Lords in the case of Duncan and Findlater had altogether misapprehended the law of England—that the Court of Session was right, and that they had decided in conformity with what the law of England was and always had been. Meanwhile, for twenty years our Courts have been administering, under the highest authority, the supposititious law of England, which thus supplanted our own; and even now, as the case I last referred to was an English one, we have not been informed by any judicial tribunal that this law is wrong, and are still bound, I presume, to continue in our course of error. All this confusion would never have arisen had the House of Lords, in the first instance, judged of the case, not on English analogies, but on the authority of the law of Scotland. Probably this and other anomalies would have been prevented had we sooner had the advantage, which, I am happy to say, we now possess, of having a distinguished, and well-trained, and thorough Scotch lawyer sitting in the Upper House. Scotland expected much when Lord Colonsay was promoted to the Upper House; and great as the expectations were, I am confident they will not be disappointed."

The observations which follow on the art of forensic oratory might be useful to others than the juniors to whom they were addressed.

MODERN FORENSIC ORATORY.

"Mere fluency, although an important, is very far from being the most important, quality of a pleader. The easy command of appropriate language is no doubt a material attainment, and is necessary to excellence. But the easy command of language, whether appropriate or not, is perhaps one of the greatest snares which can beset a pleader at the outset of his career. The man whose thoughts outrun his power of expression often chains and rivets the attention. The bright, clear intellect, even when struggling through a misty veil of confused utterance, communicates, by a secret influence, with his audience. But a man whose power of expression outruns his thoughts, never can convince. The words are only convincing as they are the envoys of the mind within: and when they throw off restraint and discipline, they become a rabble without a leader. Any one who ever heard the late Mr Jameson plead at the bar will recall a very striking illustration of what I say. He was not a fluent speaker; on the contrary, his words seemed to flow at first with difficulty and labour. They came more readily as he proceeded, but to the end they came with hesitation. But he was a most convincing, sometimes an entrancing pleader. So close was the chain of logic, so transparent his statement, so thorough

his mastery of the law, that one forgot the hesitating utterance and imperfect expression in the broad clear stream of his argument. But remarkable as this distinguished instance was, let not the true moral of it be mistaken. Although "Ammon's great son one shoulder had too high," it does not follow that the defect is characteristic of a conqueror. Clearness and accuracy of expression and elocution ought to be the subjects of steady and careful practice, and within these walls you have the requisite opportunity. When this art is fairly attained in reasonable measure, you are comparatively free to consider with a mind at ease the substance and method of your speech. Secondly, lucidity and arrangement both of statement and argument should be the subject of deliberate training. The first vice of a young pleader is brevity, or rather exiguity, of reasoning. He says what he has to say and has done it, not throwing into it the light and shadow necessary to make the picture effective. The second vice is intolerable prolixity. Having overcome the first obstacle by attaining fluency and expression, he has neglected the second requisite of precision, method, and scientific arrangement of his argument. If I may take the liberty of saying so, the last is the error to which our present practice tends. When I came to the bar, the Judges, who had been trained in the school of written pleadings, were impatient of oral debate in the Inner House. Whether they are impatient of it now or not, the outward indication is suppressed; but, if they are, they have much more reason."

A Question under the new Trusts Act.—Some inconvenience has arisen from an interpretation put by some of the judges on the words in § 16 of this Act (30 and 31 Vict. c. 97), providing that applications under the Act "shall be brought in the first instance before one of the Lords Ordinary officiating in the Outer House, who may direct such intimation and service thereof, and such investigation or inquiry as he may think fit, and the power of the Lord Ordinary, *before whom the petition is enrolled*, may be exercised by the Lord Ordinary on the Bills during Vacation, and all such petitions shall, as respects procedure, disposal, and review, be subject to the same rules and regulations as are enacted with respect to petitions coming before the Junior Lord Ordinary in virtue of the Act 20 and 21 Vict. c. 56." Lord Curriehill and Lord Mure have held, as it appears, that petitions under the Act (such as petitions for leave to feu trust-estates, of which several were presented in the autumn months) cannot competently be brought for the first time before the Lord Ordinary on the Bills in Vacation, in consequence of the words of this section, which seem to require *enrolment* before one of the Lords Ordinary before the case can be dealt with in the Bill Chamber. Further, sect. 10 of the Act of 1857 gives the Lord Ordinary on the Bills in Vacation the same powers as the Junior Lord Ordinary only in regard to certain classes of petitions there specified, among which, of course, such petitions as those in question are not enumerated. We cannot but regard the construction now put on the Act as erroneous. The section quoted confers on the Lord Ordinary in Vacation the power of the Lord Ordinary before whom the petition is enrolled, and that power must apply to the first stage in the petition as much as to any other. A petition may surely be enrolled before any of the Lords Ordinary in Vacation, although it is first written upon by the Bill Chamber judge as his *locum tenens*. It may be said that the Lord Ordinary is not sitting, and has no function in Vacation; but the Act expressly confers all the power

which he could exercise on the Bill Chamber judge; and to say that a case can only be "enrolled" before the Lord Ordinary during Session, is defeating the plain meaning of the Act in order to give effect to a plausible quibble. The condition of enrolment may, if literal fulfilment be insisted on, be satisfied by putting the Lord Ordinary's name on the back of the petition, and enrolling it in his office for the first day of Session, which may be as well done on the 21st July as the 11th of November. The words of the 10th sect. of the Act of 1857, limiting the power of the Lord Ordinary to certain classes of petitions, are enlarged by, and do not restrict, the terms of the 16th sect. of the Act of 1867. This view is confirmed by the fact that Lord Barcaple, who officiated in the Bill Chamber when the first petition under the Act was presented, ordered intimation and service without hesitation, although the petitioner, in consequence of the doubt suggested by the subsequent decisions, has seen fit to take a renewed order after the meeting of the Court. It is fortunate that the inconvenience and delay caused by this perverse construction of the Act are not likely to be so great in future, many parties having been long waiting to take advantage of the Act, and having presented their petitions at the earliest possible moment after its passing. It may, however, be still desirable that the point should be cleared by a decision of the Court, or by being noticed in any Act or Sederunt which may be passed on the subject.

Scottish Criminal Statistics.—Last month, in a paragraph chiefly founded on a leading article in the *Scotsman*, the usual accuracy of which journal was to us a sufficient guarantee of the truth of the statements it contained, we were induced to condemn in too broad terms the system of judicial statistics for Scotland. We have been reminded that that condemnation ought not to apply, at least in the same measure or on the same grounds, to the Tables of Criminal Offenders reported by Her Majesty's Advocate under 1 Wm. IV., c. 37, a sentence in which formed the immediate text of the *Scotsman's* article. A glaring and evidently accidental mistake committed by an official new to the work, and made prominent by quotation in a paper read before the Social Science Association, has caused this set of tables to be involved in the vituperation which is deservedly bestowed on the statistics, or rather no statistics, of the Scotch civil tribunals. It is just as well to point out that whatever may be the defects of this set of tables, there are as great in those of the sister country relating to the same matter,* and that they are pre-

* A paper by Mr C. S. Greaves, Q.C., in the *Law Magazine and Law Review* for Nov. 1866, shews that the English Returns are far from being immaculate. The most important paper on Scotch Criminal Statistics with which we are acquainted is one by Mr J. F. M'Lennan, in the Social Science Transactions for 1863, desiderating improvements in the system of procuring and preparing these statistics—improvements which can only be effected by the Legislature or by the Secretary of State under the existing Act. Mr M'Lennan assumes the correctness of the returns, and as he had evidently examined them carefully, it is, in fact, the testimony of a very competent authority to the general accuracy with which they are got up in the Lord Advocate's Chambers.

pared with great care and without any remuneration by the Chief Clerk to the Lord Advocate for the time being. We have looked over the returns for several years as printed, and we are bound to say that the public have no reason to complain while such labour is bestowed almost gratuitously. The process of preparing the abstract of returns in question, which is no mere fly-sheet, but a pamphlet of twenty folio pages, representing returns (not published) of 120 printed folios, is somewhat as follows:—The classified and unclassified returns, prepared by the Sheriff-clerks of counties, assisted by the Procurator-fiscals and other officials, are transmitted to the Lord Advocate on 1st January of every year, signed in conformity with the Statute by the Sheriff. The *Classified Rsturn* contains three tables, the *first* showing "the number of persons committed for trial or bailed, and the result of the proceedings," and consisting of thirty-six columns; *the second*, showing the age, sex, and degree of instruction of persons committed for trial or bailed, with thirty-two columns; *the third*, showing the courts in which persons committed for trial or bailed, were tried, the number of the convicts previously convicted of similar offences, and the number convicted of other offences at the same trial, distinguishing the sex, in these and other particulars, and containing thirty-one columns. The *Unclassified Return*, which contains the names of the persons committed for trial, with the various particulars enumerated in the Classified Return, is transmitted to the Lord Advocate for the purpose of checking its accuracy with the numbers given in the tables of the Classified Return, which last is required by the Act of Parliament to be transmitted to the Home Office. When these returns are received on January 1st at the Lord Advocate's office, the duty which the chief Clerk has to perform consists, first, in checking the returns, and then copying, on folio sheets. all the Classified Returns, for transmission to the Home Office. From these he then prepares (1.) three similar tables, showing a Classified Return for the whole of Scotland; (2.) A table showing, in each county collectively, the total number of persons committed for trial or bailed, and the result of the proceedings (thirty-six columns); (3.) and (4.) Tables showing, in each county collectively, the age, sex, and degree of instruction of the total number of persons committed for trial or bailed; in each county collectively, the total number of persons tried in each court, the total number of the convicts previously convicted of similar offences, and the total number convicted of other offences at the same trial, distinguishing the sex in these and other particulars, (thirty columns); and (5.) (6.) (7.) and (8.) Tables showing, in each county collectively, the total number of persons committed for trial or bailed for each description of offences; a comparative table, showing the sex of persons committed for trial or bailed in each of the last ten years, the total in each of the two quinquennial periods, and the number in each county respectively; a comparative table, showing the number of persons committed for trial or bailed in each of the last ten years, the total in each of the two quinquennial

periods, and the offences with which the persons stood charged; and a comparative table, showing the number of persons committed for trial or bailed in each of the last ten years, the total in each of the two quinquennial periods, and the number in each county separately. The abstract of these tables is then prepared, and transmitted, with the various tables for each county and the general tables, by the Lord Advocate, with an official communication, on the 1st of March, annually, to the Home Secretary, to be printed and laid before Parliament. The observation made by the *Scotsman* that "the returns "for Scotland come forth unauthenticated by any name" is incorrect, as they are, in the first place, authenticated by all the Sheriffs of Scotland, and afterwards by the Lord Advocate. It appears from a note in the abstract that the Home Office has endeavoured to procure returns from Scotland as nearly as may be the same in form as those for England. It is stated that—

"The following Tables for Scotland have, by directions from the Home Office, been substituted for the form specified in the Statute 1 Gul. IV., c. 37, with the view of more nearly assimilating them to the criminal tables now in use to be presented to Parliament for England. In consequence of the different systems of criminal procedure in the two countries, a complete assimilation was impracticable; but to assist in bringing the assimilation more close for comparative investigation, a comparative table of the respective classifications of offences is here annexed."

This statement of facts is enough to show not only that the returns of criminals now made up for Scotland cost no little labour, but also we think that they provide the statesman and the philanthropist with data of considerable value. The plan on which the tables are arranged might possibly be altered for the better, and additional information might be required. But as the law stands, such changes must come from the Home Office, and probably officials there feel that they cannot fairly require more (the wonder to us is that they have the face to take what they now get) without a vote by Parliament of adequate remuneration. Perhaps no higher proof can be found of the care which has for many years been bestowed by underpaid officials on this task than the fact that the writer in the *Scotsman*, writing no doubt with the best intentions and the most patriotic desire to expose abuses, could find none more grievous than an arithmetical error, which Mr Tennent ought to have detected, and he no doubt did discover by a moment's attention.

The Want of a Cheap Appeal.—No one can read the newspapers without perceiving daily the great disadvantage which Scotland suffers in not having the means of obtaining an authoritative decision of the numerous points of law which arise in the execution of statutes by magistrates of burghs, parochial boards, justices, and other public boards and officials. We have referred on another page to this grievous defect as it is felt in the Sheriff Small Debt Courts. A curious instance of it is reported to have occurred the other day at Dunbar, where the bailies take opposite views upon the question whether under the General Police Act 1862 the Commissioners of Police are entitled to go into every place and take and dispose of

pig dung, or whether this article falls under the exception in the act of stable and byre dung. Severals persons have, it appears, been prosecuted for contravention of the Act in selling their pig dung, the burgh fiscal adopting the view that the commissioners are entitled to dispose of this. Two magistrates hold that the commissioners have no right at all to enter private places and remove manure, and that they can only do so when asked. Hence a remarkable discrepancy in the decisions in the police-court according to the various views of the presiding magistrates. The state of matters described in the following paragraph is not edifying, and loudly demands a cheap appeal—a boon surely not to be denied when the Court of Session has "no adequate judicial function to perform":—

"In a case brought up last week, the two presiding magistrates were of different opinions, and the matter came to a dead-lock. Neither of them would yield to the other—the one determined to convict, and the other characterising the whole affair as legal robbery. After a lengthened soderunt, the matter was only adjusted by the Clerk suggesting a merely nominal fine. In another similar case the Fiscal craved a conviction. He considered it hard that poor people generally were compelled to give up their refuse, and those keeping pigs should get off free. Pigs were fed at a profit, and the owners of them were better able to lose the profit of the manure. Bailie Nisbet held that the accused had a perfect right to dispose of the pig manure. All the witnesses stated that there were no ashes among the manure in question, and he did not consider the Commissioners had any claim to it. Bailie Gardner agreed so far with Bailie Nisbet; but, at the same time, he accepted the Fiscal's reading of the Act. He would never convict, however, until they commenced at the beginning and made all parties alike. The Provost read the Act in a different way from the Fiscal. He thought the tacksman of the town's manure had made a mistake. All the Commissioners had to do was to clear the streets, but they had no right to go into private property. If they were to read the Act literally, they might claim all the manures, patent and otherwise, about the town. Bailie Bayne held that horse and cow dung were the only exceptions mentioned in the Act, and that the Commissioners, and consequently the scavengers, had a right to everything else. The Magistrates ultimately agreed to a decision of "Not proven," and the case was dismissed, without, however, any arrangement being made as to how they were to proceed in future."

Obituary.—Thomas Pemberton Leigh, LORD KINGSDOWN, who died at Torrehill, Kent, 7th Oct., was born in London 1793. He descended on his father's side from a family in Warrington, and on his mother's from a branch of the Leighs. He was at no public school or University, and began his career in a solicitor's office. He read for the Bar in the chambers of his maternal uncle, Mr Cooke, a distinguished equity lawyer, and in 1816 was called to the Bar. In 1829 he received a silk gown, and for many years, especially after the elevation of Bickersteth to the Bench, he stood at the head of the Bar in the Rolls Court. In 1841, he accepted from Sir R. Peel the office of Attorney-General to the Prince of Wales. In January 1843, the death of his eccentric kinsman, Sir Robert Leigh, placed Mr Pemberton in possession of a life interest in the Wigan estates, amounting to about £17,000 a-year. He retired from the Bar, was sworn of the Privy Council as Chancellor of the Duchy of Cornwall, and shortly after became a member of the Judicial Committee of that body. The duties of that office he performed for twenty years with unremitting diligence, but entirely without emolument, and with no outward recognition of his services except the peerage, which was first offered to him by Lord John Russell in 1853, and eventually conferred on him by Lord Derby in 1858. While at the Bar Mr Pemberton was M.P. for Rye, and afterwards for Ripon. His speeches in Parliament were rare and unimpassioned. Perhaps the most remarkable was that in which he resisted the pretensions of the House on the memorable privilege case of Stockdale *v.* Hansard. In the House of Lords Lord Kingsdown rarely took part in political debates. He gave his services in the judicial business of the House, although he never approved the constitution or

procedure of the House as a court of last resort, and regretted his inability to correct its defects. But it was in the more congenial atmosphere of the Privy Council, where the practice and forms of proceeding had gradually been moulded and settled by his own influence and example, that he has left the most conspicuous traces of his judicial ability. In 1858, Lord Derby offered him the Great Seal, but he refused it. By some this refusal was attributed to indolence; but indolence can hardly be ascribed to one of the most successful advocates of the English Bar, or to a man who would spend unremitting labour to perfect whatever he had undertaken to perform. Thus, the services rendered by Lord Kingsdown to the Duchy of Cornwall resulted in placing that magnificent demesne on a totally different footing. The predominant quality of his character was a fastidious refinement. "No breath of popularity," as he once expressed it, "ever touched his sail." But, if he was sensitive to the shortcomings of others, he was exacting in all that concerned himself. Many of his judgments were written several times over; all were revised with elaborate minuteness. In 1858 he had already quitted the Court of Chancery for fifteen years, and we suspect that the reason which mainly determined his refusal of the Great Seal was a distrust of his ability to perform the duties after so long an interval in a manner entirely adequate to his conception of their importance. His qualities as a judge were held by those who sat with him to be literally unrivalled. His mind was deep, clear, and unruffled; his patience inexhaustible; his sense of justice even more acute than his love of legal precision. He aimed at framing the decisions of the Court on large grounds of analogy and reason. He mastered the complicated subject of the land tenures of India; he more than once opposed an insurmountable barrier to the exactions of the Indian Government, and taught the judicial authorities of India many an invaluable lesson of moderation and wisdom. The appellate jurisdiction of the Privy Council over the Colonial Courts is now almost the sole link which holds together the British Empire. The moral influence of this British tribunal is still unshaken; and its authority was largely augmented by the wisdom, temper, and equity of Lord Kingsdown. The war of 1854 re-opened, after forty years' peace, the Maritime Courts of Prize. The principles of Lord Stowell and the practices of the last war were to be subjected to legal revision. In these questions Lord Kingsdown took warm interest; and if the decisions of that period have mitigated the pressure of war on neutrals, and substituted more civilized usages for the harsh practices of former times, no small share of the credit is due to the spirit of his judgments. Lastly, the cases of Gorham *v.* the Bishop of Exeter, Liddell *v.* Westerton, Long *v.* Bishop of Cape Town, and "Essays and Reviews" were decided by the Privy Council, and they were decided in entire conformity with his views. Lord Kingsdown never was married; his title, therefore, is extinct. Of his property the larger part reverts to a descendant of Sir Robert Leigh; the remainder passes to the brother and nephews of the late Peer.—*Abridged from the Times.*

The Right Hon. Francis Blackburne, late Lord Chancellor of Ireland, died at Rathfarnham Castle, at the age of 85 years. He played an active and distinguished part in the history of this country for a period of extraordinary duration, and his name is associated with some of its most remarkable incidents. He was descended on the maternal side from Dr Ezekiel Hopkins, Bishop of Derry during the famous siege. He was born 1782 at Footstown, Co. Neath, entered Trin. Coll. Dublin, 1798, was called to the Bar 1805, and in 1822 was appointed King's Counsel. In 1823 he was appointed to act as Judge in Limerick and Clare, to enforce the Insurrection Act, and so continued until 1825, gaining the attachment of all parties by the impartiality of his conduct. Under the Ministry of Earl Grey he was made Attorney-General in 1830, a period of great excitement and peril. He proved himself in all respects equal to the emergency, and vindicated the law with firmness, vigour, and moderation. He remained in office under the brief administration of Sir Robert Peel, to whose political views he then attached himself, having previously professed Whig principles, and he retired in 1835. On the return of the Conservative Ministry to power in 1841 he was reinstated in the office of Attorney-General, and in the following year, on the death of Sir Michael O'Loghlen, he was promoted to the office of Master of the Rolls. In 1846 he was transferred to the Chief Justiceship of the Queen's Bench, and in that capacity presided at the Special Commission which tried Mr Smith O'Brien and his associates in 1848. In 1852, he was promoted by Lord Derby to the office of Lord Chancellor, which he vacated on the retirement of his friends. In 1856, when the office of Lord Justice of appeal in Chancery was created, the Whig Government did not allow political considerations to outweigh their sense of his eminent fitness for it. He retained it until the return of the present

Ministry to power, when he was induced to accept the Great Seal again, although it involved a serious sacrifice. Early in the present year, in consequence of failing health, he resigned.

GEORGE M'CLELLAND, Esq., W.S. (1823), whose decease was noted last month, was born at Ayr, where his father was a writer and banker. He was a member of the Juridical Society of Edinburgh. At the dissolution of the firm of Hunter, Campbell, & Cathcart, W.S., in 1834, he became a partner of the new firm of Hunter, Campbell, & Co., in which he continued till its dissolution in 1843, after which he devoted himself exclusively to the ministry of the Apostolic Church, Broughton Street, to which he had belonged since its origin in 1834. In 1845, he went to America, and remained in the discharge of his ministerial duties in the United States and in Canada for fourteen years. He is the author of various books, among others of "The End of the Dispensation" and "The Human Nature of Christ," two discourses.

HUGH HANDYSIDE, Esq., W.S. (1827), died at Kirkton Lodge, Murrayfield, on Nov. 3. Mr Handyside was best known as Secretary to the Sustentation Fund, Church and Manse Building, and other Committees of the Free Church.

PATRICK GRAHAM, W.S. (1824), (firm, Graham & Johnston, W.S.), died at Edinburgh 15th Nov. He was for many years in partnership with Mr Peter Anderson, W.S., Law Agent for the City of Edinburgh, under the firm of Graham & Anderson. On Mr Anderson's death, Mr Graham succeeded him in that office, which he held till his death.

THOMAS BARTY, Esq., Solr., N.P. (1827), (firm, Thomas & J. W. Barty, Dunblane), Joint P. F. for Western District of Perthshire, died at Anchorfield, Dunblane, 15th Nov. He was Clerk to the Income Tax and Assessed Taxes, and District Prison Board.

Appointments.—Mr Thomas Dickson, whose appointment to the office of Assistant Curator of the Historical Department of the Register House was noted in our July number, has been promoted to the office of Curator of that Department, vacant by the resignation of Mr George Skene, Advocate, formerly Professor of Law at Glasgow. Mr Skene had held the appointment only for a few months.

Correspondence.

An order of Court was made the other day in our Sheriff Court, which occasioned considerable surprise. A firm sued a Railway Coy. for the price of a property which they had agreed to purchase, the terms of the bargain being that the price was to be payable on the delivery of a valid title. The pursuer stated that he was ready to give a valid title, and asked for decree for the price, subject to that condition. The Sheriff ordered him to lodge in process *an abstract* of the title, in order that the Court might judge of its validity.

The following decision in the S.D.C. also created some surprise. At a public sale a party bought what on tasting he believed to be port, and what was represented to him to be such. The liquor turned out not to be port, and he sued the auctioneer for repetition. The Sheriff held that although the rule that a man's eye is his merchant might apply, still as the wine turned out not to be port, the pursuer was entitled to L.5 of damages. Is a man's mouth not his merchant as well as his eye?

P. B.

PROCURATORS' APPRENTICES.

SIR,—I observe in last month's *Journal*, in noticing the provision introduced into the Debts Recovery Act as to stamp duty on Indentures, you quote a correspondent of the *Scotsman*, who indicates an opinion that indentures that have been written on insufficient stamps or plain paper will be stamped with the deficiency of duty by the Commissioners of Inland Revenue on payment of a maximum penalty of L.10, like an ordinary deed.

This is quite a mistake on the part of the *Scotsman's* correspondent. Indentures, as a general rule, cannot be validated by after-stamping, but the Act of 19 & 20 Vict., c. 81, makes an exception in favour of legal indentures. The terms upon which that exception is granted, however, are:—(1.) That the party obtain the consent of the Lords of the Treasury; and (2.) pay a penalty of L.10 *a year* (but not above L.50 in all) for each year or part of a year that has elapsed since the date of the indenture.

The same correspondent also refers to the case of parties who have neglected to obtain any indenture under the Procurators' Act. He says such parties should now execute and record an indenture, making the apprenticeship in it commence in May last. But such an indenture would not qualify for admission. The Procurators Act requires that the party "shall have been bound under an indenture in writing to serve at least for four years." Now, if an indenture is entered into at present with the period of apprenticeship terminating at May 1871, as it would if made to run from May last, it is evident that the party has only been "*bound in writing*" to serve for three years and six months, which is not a compliance with the requirements of the Act. The six months allowed for recording the indenture are apt to lead one to overlook this.

I have thought it well to point out these things, as the working of the Procurators Act is not yet very familiar—were it so, the mistakes I have referred to would not have been made—and it would be a pity that parties should be led to suppose that they had taken the proper steps to secure a qualification under the Act when they really have not.—Your ob. servt., S. N.

Notes of Cases.

COURT OF SESSION.

(Reported by William Guthrie and Donald Crawford, Esquires, Advocates.)

FIRST DIVISION.

WILL *v.* ELDER'S TRUSTEES—*Nov.* 6.

Heritable Security—Adjudication—Right to demand Assignation.—The pursuer and his brothers were heirs-apparent of provision in heritable subjects, pursuer having right to a certain portion of those subjects, and the remainder being divided among his brothers in definite shares. Elder obtained decree of constitution against the pursuer and his brothers, jointly and severally, for certain advances amounting to £133, 16s.; and afterwards adjudged the whole subjects referred to. Upon the decree of adjudication infeftment followed; and Elder, and after him his trustees, possessed the subjects and drew the rents. The rents went partially to extinguish the debt and interest; but it was admitted that a balance remained due to defenders. In these circumstances, pursuer, as one of the

joint and several co-obligants in the debt, brought this action, concluding *inter alia* that defenders should be decerned to accept payment from him of the whole balance due to them, and to assign to him, with a view to his operating his relief, the whole security constituted in their favour by the adjudication. Defenders offered to accept from pursuer his own proportion of the debt, and to convey to him their security over his own portion of the subjects. The L. O. (Jerviswoode) sustained this contention. Pursuer reclaimed.

Lord PRESIDENT. The right to demand an assignation was always an equitable one, and here the whole equity of the case was against pursuer. He was not in a position to discharge defrs. of their intromissions, except as to his own subjects, and defrs. would not be in safety to transact with him with regard to subjects confessedly belonging to his brothers.

Lord CURRIEHILL concurred. He thought pursuer might pay the balance and then insist for declarator of redemption, which would place all parties where they were prior to the adjudication. He did not see how the pursuer could ask the Court to make over to him individually the whole right to the subjects adjudged.

Lord DEAS and Lord ARDMILLAN concurred.

Act.—Monro, Macintosh. Agents—Hill, Reid, and Drummond, W.S.
——Alt.—Gifford, Hunter. Agent—William Mitchell, S.S.C.

MP—SCOTTISH EQUITABLE INSURANCE CO. *v.* CHAMPION AND OTHERS.—*Nov* 9.

Husband and Wife—Antenuptial Contract—Provision of Conquest.

Mr Duncan effected a policy of insurance with the real raisers on the life of his wife, payable to himself, his heirs, or assignees, six months after the death of Mrs Duncan. He assigned it, 26th May 1838, to his sister, Mrs Graham, and her son, Alexander. It was again transmitted by assignation on 12th July 1844 to trustees for Mrs Graham. Both assignations were duly intimated. Mr Duncan died on 17th Aug. 1862, leaving a settlement. Mrs Duncan died 20th Nov. 1864; so that the policy became payable on 20th May 1865. The assignees claimed the sum in the policy and bonuses, founding on the intimated assignations; and the representatives of Mrs Duncan claimed the half of the sum, on the ground that, in assigning the policy, Duncan committed a fraud on his ante-nuptial marriage-contract, which conveyed the whole means of the spouses, heritable and moveable, pertaining or belonging or due and addebted to them at the date of the marriage, or which should pertain or belong to them or be due or addebted to them at the dissolution of the marriage by the death of either of them, to the survivor in liferent, excepting only the heritage belonging to Mr Duncan, which was to descend to his own heirs, and appointed the fee of the estate of the spouses, other than Mr Duncan's heritage, to be divided (in the event, which occurred, of there being no children of the marriage) into two equal parts, one belonging to the heirs and executors of each spouse, each having power to test upon their respective shares. The L. O. (Jerviswoode) sustained the pleas for Duncan's assignees, and repelled the claim of Mrs Duncan's representatives. The latter reclaimed.

Lord CURRIEHILL.—The clause consisted of two parts, one relating to the *acquisita* at the date of the marriage and the other to what should belong to the spouses at its dissolution. The policy did not belong to Mr or Mrs Duncan at either date. Taking the words, therefore, in their literal meaning, the clause did not include the policy. But if the argument really meant that the funds used in creating the policy fell under the operation of the clause—*i.e.*, that Mr Duncan had misapplied such funds in paying the premiums,—then, there being no allegation of his insolvency, the remedy was to call his representatives to account, not to pursue the subject purchased with these funds. Nor was the income arising to Duncan from his own industry or otherwise included in the conveyance, unless it continued in his possession till the dissolution. It was to be presumed that the premiums were paid from income: Mrs Duncan's representatives indeed say, from income of the joint property; but as soon as it was realised it was his, because his *jus mariti* was not excluded. Hence neither the policy nor the sums paid as premiums were included in the conveyance. It was unnecessary to go farther, but it was right to state the opinion he had as to the meaning of such deeds. A technical meaning had been attached to certain phrases. What was called liferent was in many cases really fee, and fee was often a mere destination or right of succession. As to the construction of marriage-contracts, when the subjects conveyed in such a deed consisted not of special articles but of a *universitas*, very special rules had long been established. One of these rules was founded on the common maxim that "a man could never be rich unless his wife would let him;" and it was a usual arrangement that conquest should be provided to the married persons themselves and their children, thus furnishing an encouragement to a thrifty wife. But when such a provision of a *universitas* was made by ante-nuptial marriage-contract even *per verba de præsenti*, the husband remains the absolute owner, with right of administration, and with power of disposal for onerous causes and even gratuitously, unless his alienation of it is clearly a fraud on the marriage-contract. This rule was very clearly established two centuries ago (Cowan *v.* Young, 9th February 1669, M. 12,942). This had been, as Gosford puts it, a "practick" ever since (Erak. III., 8, 43; Oliphant, 10th February 1629, M. 3066). Hence, even if the premiums had not been paid from income belonging absolutely to the husband, there would have been no difference, because not only conquest, but also what belonged to the spouses at the marriage, was conveyed; and the latter was brought under the legal rule applicable to the clause of conquest. Neither, therefore, on the literal nor technical construction of the clause did the sum in the policy belong to Mrs Duncan's representatives.

The other Judges concurred, and the Court substantially adhered.

For Mrs Duncan's Representatives—Cook, Agent—J. N. Forman, W.S. For Duncan's Assignees—Fraser and Duncan. Agent—R. Hill, W.S.

LYELL *v.* GARDYNE—*Nov.* 20.

Jury Trial—Expenses.

Lyell sought for declarator of a public right of way along the avenue of Gardyne and past his mansion-house. The jury returned a verdict for

pursuer, which was set aside as against evidence. On a second trial, the verdict was for defr. Both claimed the expenses of the first trial.

The Lord PRESIDENT agreed with the principles laid down by Lord Colonsay in *Lindsay* v. *Shiel*, Jan. 31, 1863, 1 Macph. 380. Whenever a perfectly pure case arose of a verdict on a first trial for the pursuer being set aside, and a verdict for defr. returned on the second trial, there being no allegation of miscarriage by either party, the proper course would be to find neither entitled to expenses. Here the pursuer could clearly not get expenses; and it was not enough that it was not the defr.'s fault, but that of the jury, that he did not get the verdict on the first trial. Certain circumstances, however, appeared very unfavourable to the pursuer, which were such as to lead him to give expenses to the defr. who had been improperly brought into Court.

Lord DEAS observed that *Cullen* v. *Smeal*, March 8, 1855, 17 D. 636, was a strong instance of the case in which a party, successful in an incidental point and incurring very great expense in its discussion, was yet, because defeated in the main issue of the cause, found liable even in the expenses of that part of the cause in which he was successful. This rule was not always applicable to repeated jury trials, for it was always difficult to say how far the failure on the first trial was due to the party who failed; and a special case must be made out by a party so failing, in order to entitle him to expenses. However, the pursuer was not in good faith in bringing his action. His Lordship would not say the pursuer had speculated on the prejudices of juries, for he did not think himself entitled to know judicially that there were such prejudices.

Lords CURRIEHILL and ARDMILLAN concurred, and the Court applied the verdict, and assoilzied, finding defr. entitled to expenses of both trials.

[Note for Reference: Richardson *v.* Lamond, 1 Macph. 948.]

Act.—Clark, Watson. Agent—James Webster, S.S.C.——Alt.—Sol. Gen., Mackay. Agent—Alexander Howe, W.S.

MACKAY *v.* MACKAY—*Nov.* 21.

Debts Recovery Act, 1867.

In an appeal under the Debts Recovery Act, appt. ordered to print the process in the Inferior Court, and case sent to Summar Roll. Obs. by L. Pres., that it was not to be taken for granted that all cases under this Act would as a matter of course be sent to the Summar Roll. Although the Act said that the parties should crave the Court to do so, it did not say that the Court *was bound* to send them there.

SECOND DIVISION.

BAIN *v.* DUKE OF HAMILTON AND DUNLOP.—*Nov.* 4.

Property—Reparation—Reservation of Minerals.

Action of damages at the instance of Bain of Morriston against his superior to whom the minerals in that estate belong, and his tenants, for injury to lands and houses by the defenders' coal-mines. The first feu-right in 1653, reserved "power to win coals and coal-heughs within the bounds of the said lands, and to use and dispone thereupon at our pleasure,

with free ish and entry thereto, I and my foresaid giving satisfaction and payment to the said R. M. and his foresaids for all skaith, damage, and interest that they should happen to incur therethrough, by the sight of four honest neighbours to be mutually chosen." The investiture was renewed in 1698—"Reserving power to us as superiors of the said lands, and for that effect to set down shanks within any part of the said lands, and to use and dispose upon the said coals as we please, we always giving satisfaction for the damage they shall happen to sustain through leading or setting down of the said shanks." This clause was inserted in the subsequent titles. Defenders contended that the original reservation was superseded by that of 1698, under which the vassal could claim reparation only for loss caused by the shanks within the lands, whereas the damage in the present case was caused by the working of pits sunk in other lands. The L. O. (Kinloch) repelled this defence, and "found it relevant to infer a liability for damages that the defrs., or either of them, had produced injury to pursuer's land, or the houses thereon, by working the minerals beneath the same, without leaving sufficient support to the surface. The Court adhered. Obs. by Lord Cowan that it was not clear that the precept of *clare constat* in 1698 altered the reservation. It must be read with reference to the original title. At all events, there was nothing in the titles which could deprive the pursuer of his claim to damages at law, apart from contract, if his lands had been injured by improper operations.

Act.—Clark, Shand. Agents—Ronald and Ritchie, S.S.C.——Alt.—W. M. Thomson. Agent—George Wilson, S.S.C.

OAKELEY *v.* CAMPBELL AND OTHERS. —*Nov.* 6.

Poor-Law Act—Poinding—Warrant—Justice of Peace.

Pursuer's goods were poinded and sold for L.26 of poor-rates. He sued defenders—the collector of poor-rates, who obtained the warrant; J.P. who signed it; and the sheriff-officer who executed it—concluding for reduction of the warrant and execution, and for damages. The warrant bore to be granted "as directed by the statute 8 and 9 Vict., 22 cap. 83, sec. 88; and 52 Geo. III., cap. 93, secs. 13 and 14." Pursuer maintained that the Act of Geo. III. cited had no bearing on the matter, and that even cap. 95, which was intended, conferred no jurisdiction on Justices of the Peace, still less on a single Justice, but only on Commrs. of Supply; and that the warrant was illegally and oppressively executed. The L.O. (Jerviswoode) ordered issues. Defrs. reclaimed. Held that by sec. 88 of the Poor-Law Act it was competent for a single Justice to sign such a warrant, such an act being ministerial; that the misrecital of the Act of George III. was unimportant, the provisions of the Poor-Law Act being sufficient, and not impaired by the unnecessary misquotation; and that any claim for damages was excluded by sec. 86 of the Poor-Law Act.

Act.—Pattison, Thoms. Agent—W. Officer, S.S.C.——Alt.—Sol.-Gen., Watson. Agents—Adam, Kirk, and Robertson, W.S.

MORONEY & CO. AND OTHERS *v.* MUIR & SONS AND OTHERS.—*Nov.* 6.

Sheriff—Competency—Summons—Reduction.

Advocation from Glasgow of an action of reduction under 1696, c. 5, of transfers of delivery orders by Jackson & Son of 2000 bags of thirds to

defrs. There were also petitory conclusions for the restoration of the goods, or their value. The Sheriff (Alison) dismissed the action, as being incompetent in the Sheriff Court (*Dickson* v. *Murray*, June 7, 1866, 4 Macph. 797). The pursuer advocated. *Held*, that, though the reductive conclusions were incompetent, the petitory conclusions were sufficient to enable the Sheriff to decide the merits. The summons need not be grammatically perfect, after excision of the reductive part. Remitted.

Act.—Decanus, Clark.—Agent—J. Webster, S.S.C.——Alt.—A. Moncreiff, Lancaster.—Agents—Wilson, Burn, & Gloag, W.S.

RODGER *v.* CRAWFORDS.—*Nov.* 9.

*Husband and Wife—Assignation of Lease—*20 *and* 21 *Vict. c.* 26.

Declarator and removing, the question being as to the right to a long lease of subjects in Saltcoats, to which pursuer was assignee under a series of assignations originally proceeding from Mr Crawford, all recorded, along with the lease itself, in terms of the "Registration of Leases Act." Pursuer sought declarator of his sole right to the subjects, and that defrs. were bound to remove and cede possession to him. Defrs. pleaded that Mrs Crawford had right to the subjects in virtue of (1.) an assignation in trust by her husband to one Coulter prior to the assignation to pursuer's author; and (2.) a re-assignation by Coulter to her and her husband "in conjunct liferent, and to the survivor of them and his or her assignees in fee," also prior to the origin of the pursuer's title. It was said that the spouses having had possession upon this deed, it was not thereafter in the husband's power to defeat his wife's right under it; and, further, that assignations founded on by pursuer were inept in a competition with defrs., because (1.) none of them was conform to Schedule C in the Long Leases Act, in respect that they omitted, in setting forth the transmissions of the lease, to set forth the assignation to Coulter, and his re-assignation to Crawford; and (2.) one of the assignations was in security for future advances, and not for a definite sum of money, which was a thing not contemplated by the Act. *Held*, that in no view did the re-assignation constitute a completed right that could compete with assignations duly recorded under the Act of 1857, as the possession following on it was not necessarily to be attributed to it; that the Act did not contemplate that assignations should set forth inchoate and latent transmissions such as those to and from Coulter were; and with regard to the indefiniteness of the consideration in one of the assignations, that was not a question pertinent as between the present parties.

Act.—Sol.-Gen., Burnet.—Agent—J. Thomson, S.S.C.——Alt.—Scott, Brand.—Agents—M'Gregor & Barclay, S.S.C.

MACMILLAN *v.* PRESBYTERY OF KINTYRE, &c.—*Nov.* 19.

Grass Glebe—Arable or Pasture Land.

Reduction at instance of Macmillan of Ballinakill, against the Presbytery of Kintyre, and Campbell, minister of Kilcalmonell and Kilberry, of a resolution or minute of the said Presbytery, dated 25th Feb. 1865, whereby they designed a portion of the pursuer's lands as a grass glebe for Campbell. Pursuer alleged, *inter alia*, that the land in question was not

grass land, but arable. The L. O. (Barcaple) found, on a proof, that the ground designated was arable, repelled the defences, and reduced. Defenders reclaimed.

Lord Justice-Clerk.—When the statute anent the designation of glebes was passed, there was probably little difficulty in distinguishing what land was arable and what was pasture. Arable land was "infield" land, and pasture was "outfield" land, and these terms were well understood. Now, however, the whole face of the country had been changed by agricultural improvement and other causes, and the only principle which could now be followed was that land should be considered arable which had been for a long course of years dedicated to the raising of cereal corps. The Court could not adopt the view that the thing to be looked to was whether the land was naturally more suitable for pasture or for cereal crops. The actual history of the ground was the test, and not any speculative considerations as to what was most beneficial.

The other Judges concurred.

Act.—Decanus, N. C. Campbell.—Agent—John Martin, W.S.——Alt.—Shand, Asher.—Agents—Adamson and Gulland, W.S.

CATTO, THOMSON, & Co. *v.* GEORGE THOMSON & SON, AND OTHERS—*Nov.* 19.

Proof—Accommodation Bill—Partnership.

Action against George Thomson & Son and the executors of W. L. Thomson, some time sole partner in the said firm, to recover £11,773, the amount in a series of seven bills drawn by the firm upon, and accepted and retired by, the pursuers. It was averred that the bills were truly granted by the pursuers for the accommodation of the defrs.' firm. It was pleaded that the pursuers' averment could only be proved by defrs.' writ or oath. The pursuers recovered the books of the firm, which were found not to throw any light upon these transactions. They now asked diligence to recover the books of George Thomson, the managing partner, as an individual; and pleaded further that the bills, being avowedly accommodation bills on the one side or on the other, the true character of the transaction could be proved *prout de jure*. The L. Ordinary (Kinloch) refused the diligence, on the ground that the books sought would not be the writ of defrs.' firm; and held that proof *prout de jure* was incompetent, and therefore assoilzied defrs., reserving all competent reference to oath.

The pursuers reclaimed; but the Court adhered on the same grounds.

Act.—Clark, H. Smith. Agents—M'Ewen and Carment, W.S.——Alt.—Young, Shand. Agents—Cheyne and Stuart, W.S.

SHERIFF COURTS.

(Lanarkshire.—Before Mr Sheriff Glassford Bell.)

Sequestration. WEIR BROTHERS—*Oct.* 1.

Examination of Creditor as to his own Claim—19 and 20 Vict., c. 91, s. 90.

In the examination of Abbot in the sequestration of Weir Brothers, it was objected to an interrogatory that it involved an examination into the

witness's own claim against the bankrupt estate. There was a long course of dealing between bankrupt and witness, including a number of bill transactions. The witness (who was himself bankrupt) alleged that a balance was resting-owing to him, and his trustee was prepared to constitute the claim by action, and claimed for the amount on the estate of Weir Brothers, founding on the bills as adminicles of evidence to instruct this. The Sheriff held that, under s. 90 of the 19 and 20 Vict., c. 91, and upon the authority of *Paul* v. *Robb*, Feb. 21, 1855, 17 D. 457, "a creditor cannot be examined regarding his own claim." The Sheriff says:—

"In *Nisbet*, 28th January 1837, it was laid down that the mere customer of a bankrupt, or any one who dealt with him, or who was one of his creditors, was not to be subjected to examination under the words of the Bankrupt Statute then in force, that he was "connected with him in business." These words are now altered so as to make it competent to examine any one "who can give information relative to the bankrupt's estate;" but it has always been held under all the Acts that a trustee is not entitled to insist on a witness submitting to a precognition regar ding his own claim, which must be established by the ordinary vouchers. *Ridpath*, 20th July 1844, 6 D. 1438. Although it was ingeniously argued that the rule established in 1844 fell to be modified in respect of the Evidence Acts of 1852 and 1853, under which a party to a cause was made a competent witness on either side, it will be seen, on a moment's consideration, that these Acts have no applicability to the present question. In an examination under the Bankrupt Statute the trustee and the witness do not stand in the relation to each other of parties to a cause. It is by force of statute alone, and not at common law, that the trustee has a right to examine any witness, and that right is conferred upon him subject to an equitable limitation as regards the subject matter of the witness's own claim. It was also pleaded that, by sec. 126, express authority was given to the trustee to examine a creditor on oath relative to his claims. But it rather appears (1), from the terms of the sec., that the examination must be confined to the "grounds of debt" produced with the oath; and, (2), the power, whatever it is (and the Sheriff is not aware that it has ever been exercised), is given solely when the period comes for the trustee adjudicating upon claims, and not for the other purposes contemplated by sec. 90. Accordingly, in *Paul* v. *Robb*, decided after the Evidence Acts, and under express reference to the Bankrupt Act, 2 and 3 Vict., cap. 41, then in force (sec. 68 of which was almost identical with sec. 90 of the present Act), Lord Deas said—"If anything is settled under the statute it is settled that the statute cannot be used for the examination of an opposite litigant;" and from the observations of Lord Curriehill in the same case, it appears that he considered the examination of an agent of a claimant regarding the subject matter of his client's claim clearly incompetent."

(Forfarshire S. D. Court, Dundee, before Sheriff Smith).

INSPR. OF MONIFIETH *v.* INSPR. OF DUNDEE—*Nov.* 5.

Poor—Voluntary Removal—25 *and* 26 *Vict.*, *c.* 113.—Summons for £12, being an advance made by the former parish to the family of an Irishman named Michael Reid, who had deserted his family in that parish. In the year 1864 or 1865, Reid became chargeable to Dundee, and received relief for eight or ten months. It was then arranged between the Inspr. of Dundee and Reid that the latter was to go home to Ireland, Dundee parish paying his expenses. The Inspr. did not obtain from the Sheriff a warrant to send him to the place of his birth, and the pauper came back to Monifieth, where he deserted his wife and family. Monifieth maintained that Dundee was liable to relieve it of all expenses, because the pauper came back through the fault of the Inspr. of Poor for Dundee, who neglected to obtain the proper warrant. The Act 25 & 26 Vict., c. 113, repealed the 77th sect. of the Poor Law Act, and the Board of Supervision had issued circulars expressly requiring all removals to be effected under the Sheriff's authority

(25th Nov. 1858 and 15th Feb. 1866). It was contended for Dundee that the 77th sect. of the Poor Law Act was not repealed, and that the power of voluntary removal still existed; that the removal of Reid from Dundee took place before the circular of Feb. 1866; and that even if the voluntary removal was wrong in point of form, still the pauper was able-bodied, and having come to Scotland, was free to go where he pleased, working throughout the country; and having settled in Monifieth, he supported his family for ten or twelve months. The case could, therefore, only be viewed as that of an ordinary Irishman working throughout the country, and becoming chargeable where it might happen.

The Sheriff-Substitute said "he was not required to say whether, under 25 and 26 Vic., c. 113, it was now competent for a Parochial Board to give to an Irish pauper, willing to go home to Ireland, the means of doing so; for, assuming that it was not, he was clearly of opinion that, on the facts stated, Monifieth had no claim of relief against Dundee. A pauper in receipt of relief from one parish is entitled to leave it and apply to another, and that application the second parish is bound to entertain, its only remedy being recourse on the parish of settlement. If, indeed, the Inspr. should fraudulently assist a party out of his parish for the express purpose of transferring the burden of his maintenance elsewhere, it has been held that there is no valid transfer of the liability, and the parish to which he first made application remains bound to maintain him till the parish of settlement is established or admitted. But these cases assume that the man's pauperism is continuous and unchanged, and the principle on which they were decided would not apply to a case in which the pauper, after ceasing to receive relief from parish A, was able to maintain himself for a time by his own exertions or the assistance of friends before he made application to parish B. In such a case the second application for relief is a new act of pauperism, which would require a second notice to the parish of settlement, in order to preserve the right of recourse competent to the relieving parish (*Beattie* v. *Wood*, Feb. 9, 1866, 4 Macph. 426). Here, the pauper having been sent to Ireland by Dundee in Sept. 1865, returned to Monifieth in Nov. He was not, however, a pauper for several months after, for he maintained himself, and his wife and family without Parochial aid, till his desertion in Oct. 1866, and it was not till Nov. 11 that his family were admitted to the roll. In such circumstances, it is impossible for pursuer to maintain that the chargeability of the family was the direct and necessary result of the alleged wrongous proceedings of Dundee; otherwise how far is the claim to extend? If several years, instead of months, had elapsed between the removal and the date of chargeability, would the pursuer have had any claim of relief against the defender? I can see no reason for holding this, and therefore the defender is assoilzied with expenses."

Act.—Pattullo & Thornton.——Alt.—Hay.

(Fifeshire, Dunfermline, before Sheriffs Mackenzie and Beatson Bell).

SHEARER *v.* NISBET OR MORRIS.

Debts Recovery Act—Bill.—The circumstances of the case sufficiently appear from the judgment of the Sheriff-Substitute, which as one of the first decisions under the Act we give in full:—

"*Dunfermline, 31st October* 1867.—The S.-S. having tried the cause, and, at the request of the pursuer's agent, having dictated notes of evidence to a shorthand writer, and having heard parties' procurators, finds, in point of fact (1), That the first conclusion of the summons is laid partly upon a bill for £19, 2s. 6d., alleged to have been accepted by the defender, and, *quoad ultra*, is for goods sold and delivered to the defender, amounting to 18s. 8½d.; (2), That the alternative conclusion is partly for goods sold and delivered to the defender's husband, whom she is alleged to represent by vitious intromission, and, *quoad ultra*, is for the same goods sold and delivered to the defender, as mentioned in the first conclusion; (3), That the last item in the account for goods sold and delivered to the defender's husband, is more than three years from the date of the summons, and that the pursuer has failed to prove by the defender's writ or oath that the same is resting owing; finds, in point of law (1), That the action, in so far as laid on a bill, is incompetent in this form; (2), That the account for goods sold and delivered to the defender's husband is prescribed; (3), That the only remaining claim being for a sum under £12, is incompetently sued for in this form; therefore assoilzies the defender from the conclusion for payment of the account for goods sold and delivered to her husband, and, *quoad ultra*, dismisses the action and decerns. Finds it unnecessary to dispose of the question of vitious intromission; finds the pursuer liable in 30s. of expenses, being the defender's procurator's fee, and decerns for the same.

"*Note.*—The pursuer candidly conceded that he had failed to instruct the resting owing of the prescribed account, and that the balance remaining was too small to be sued for in this form. The only question remaining for decision is whether it is competent to sue upon a bill in the summary form provided by the 'Debts Recovery Scotland Act of 1867.' The Sheriff-Substitute is humbly of opinion that it is not. The application of that Act is limited to 'actions of debt that may competently be brought before him (the Sheriff) for house maills, men's ordinaries, servants' fees, merchants' accounts, and other the like debts.' The words of the Act 1579, c. 83, introducing the triennial prescription are the same, except that the concluding words are—'uther the like debts that are not founded upon written obligationes.' The pursuer contended that the omission of these words in the Debts Recovery Act enabled him to pursue for the contents of a bill, at all events, if granted for a merchant's account. The Sheriff-Substitute, however, cannot accede to this view. An obligation constituted by a bill is different in almost every essential from one arising upon an open account—the sum in the one is liquid, in the other it is illiquid; in the one the obligation arises from the acknowledgment that a particular sum is due, in the other from a multitude of contracts of sale; to the one a triennial, to the other a sexennial prescription is applicable. In short, the bill is a *literarum obligatio*, excluding (unless in a certain very limited class of cases, and in a very limited mode) all inquiry as to the nature of the debt which it liquidates; and the Sheriff-Substitute is of opinion that even when a bill is granted for a merchant's account, it can in no sense be said to be a like debt to that account. It is because of its very unlikeness that parties have recourse to it, transferring by its means an illiquid into a liquid debt. With regard to the alternative conclusion of the summons, the Sheriff-Substitute may explain that there is probably a good answer to it,

besides the one on the proof which has been sustained, on the ground that the defender having taken a bill for the amount, the debt is extinguished by novation. As, however, such a plea was not stated at the diet for noting pleas, and there does not appear any authority for adding a plea at the trial, the Sheriff-Substitute has not considered it."

The pursuer appealed to the Sheriff, who adhered, concurring "in the very distinct findings and grounds of judgment set forth in the interlocutor appealed against, and note annexed thereto."

Act.—Macbeth——Alt.—Paterson.

(Lanarkshire, Hamilton, before Sheriffs Glassford Bell and Veitch).

RULE *v.* THOMSON.—*Nov.* 7.

Debts Recovery Act, 1867—Reference to Oath.

Action for £41, 16s 7d, being balance of account for wood supplied in 1856. Defr. denied the debt, and pleaded prescription. The S. S. assoilzied with costs, and added a note stating that the account was prescribed and in the absence of proof by writ was referred to defr's. oath, and shortly referred to the import of the oath of the defender. The pursuer appealed. The Sheriff found that the pursuer having admitted the validity of the defender's plea of prescription, and having also admitted that he had no proof by writ, said defr. fell to be simpliciter assoilzied, unless the pursuer tendered a minute of reference to his oath, upon which it would have fallen to the Sheriff-substitute to consider and sustain the reference if he saw fit, and to appoint defr. to appear and depone; that it appeared from the interlocutor appealed against that a verbal reference was made to defr's. oath, and that he deponed under it without any formal record being kept of the deposition: but that although such procedure might be competent in a Small Debt Court, which is not a court of record, and in which there is no appeal from the S. S. to the Sheriff, it is not competent under the Debts Recovery (Scotland) Act, in respect that an appeal lies from the judgment of the S. S. on the oath of reference to the Sheriff, and unless the same has been proceeded in and taken in the same form as in the Sheriff's ordinary Court, the Sheriff has no data upon which to proceed in considering the appeal. The Sheriff recalled the interlocutor, and remitted to the S. S. to allow the pursuer to lodge a minute of reference to the defender's oath, to sustain said reference if so advised, to take and authenticate the oath in common form, &c.

Act.—Wm. Brown.——Alt.—Currie.

(Lanarkshire, Glasgow, before Sheriffs Strathern and Bell).

MITCHELL *v.* FINDLAY & Co.—14*th Nov.*

Charter Party—Freight.

By charter party dated 21st February 1857, it was contracted that the pursuer's ship *John Mitchell*, then at Bristol, and every way well found, should load a cargo of coals, proceed to Moulmein, and there discharge the same at the depot of the defrs.; that she should thereafter reload with a cargo of teak, and return to Queenstown or Falmouth, there to await orders; and that she should deliver the cargo at a safe port in Great Britain. In her outward voyage she encountered such heavy weather as to necessi-

tate the throwing overboard of several tons of coal, and when she arrived at Moulmein was found so disabled as to be quite unseaworthy, and therefore unable further to implement the charter-party. This action was brought by pursuer to recover freight on the out-bound cargo, so far as delivered. He contended that the vessel was, by reason of the perils of the sea, constructively lost, and that defrs. were liable in freight *pro rata itineris*. *Held* by the S.S. that the pursuer had no such claim, as what was contemplated by the charter-party was one voyage, though *two cargoes* were named, and that the pursuer not having fulfilled the contract, could not recover under it. The Sheriff affirmed.

[Cases cited by S.S.—Taylor and Co. *v.* Hogg, 9th July 1802, M. 10,113; Cook *v.* Jennings, 7 T. R. 381. See Shee's Abbot, 11th ed., p. 393.]

HIGH COURT OF JUSTICIARY.

(Before Lords Justice-Clerk, Cowan, and Neaves.)

ALEXANDER *v.* LINDSAY.—*Nov.* 13.

Conviction—Customs—Jurisdiction—Review—Competency.

Susp. and Lib. against a conviction before Justices of the Peace of Kincardineshire, under Customs Consol. Act 1853. The information set forth "Alexander obstructed one William Finnigan, employed for the prevention of smuggling, contrary to section 247 of the Customs Consolidation Act, 1853, whereby the said John Alexander has become liable to be imprisoned as is therein directed," and he was convicted "of having within three years now last past—to wit, on the 12th day of October obstructed," &c., as before. He suspended on the ground that the information did not specify the time or place of the alleged offence, which were required at common law in every criminal indictment, Hume ii. 38,—a principle which was not derogated from by the form in the Act founded on. That Act only sought to shorten the form of information formerly in use, and did not dispense with matter so essential as the time and place in a criminal charge. The want of specification of these caused an essential nullity in the proceedings, not a mere want of relevancy, which entitled the Court of Justiciary *to interfere*, even although its jurisdiction on the merits might be excluded (*Yeaman* v. *Tod*, July 11, 1836, 1 Swin. 247; *Young* v. *Townshend*, Nov. 24, 1856, 2 Irv. 525). These and other objections had been stated before the Justices, and repelled.

Bill of susp. and lib. refused, the information, summons, and conviction all being in strict accordance with the forms in sched. B of the statute. The real question was whether the Court had jurisdiction. The objection raised a question of relevancy stated to the competent Court below, and disposed of by it. To consider whether it had there been rightly dealt with would be to review the judgment on the merits. But by sec. 263 the only competent Court of review on the merits was the Court of Exchequer; and as there was no patent irregularity or incompetency on the face of the proceedings, the Court of Justiciary could not interfere. Want of relevancy did not affect the question of jurisdiction.

Act.—Fraser, Burnet.—Agent—John Thomson, S.S.C.——Alt.—Advocatus, Sol.-Gen., Muirhead.—Agent—W. H. Sands, W.S.

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ANNO TRICESIMO

VICTORIÆ REGINÆ.

CAP. V.

An Act to repeal the Duties of Assessed Taxes on Dogs, and to impose in lieu thereof a Duty of Excise.—[29*th* March 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

From and after 5th April 1867 in England, and 24th May 1867 in Scotland, Assessed Taxes on Dogs to cease.

I. The Duties of Assessed Taxes payable in *Great Britain* under and by virtue of the Act passed in the Sixteenth and Seventeenth Years of Her Majesty, Chapter Ninety, for or in respect of Dogs, shall cease to be payable for or in respect of Dogs kept in *England* after the Fifth Day of *April* One thousand eight hundred and sixty-seven, or kept in *Scotland* after the Twenty-fourth Day of *May* One thousand eight hundred and sixty-seven; and all the Provisions, Rules, and Regulations, and Exemptions contained in the said Act, or in any other Act relating to the said Duties, are hereby repealed, save so far as the same respectively relate to Dogs kept in *England* before or on the said Fifth Day of *April* One thousand eight hundred and sixty-seven, or kept in *Scotland* before or on the said Twenty-fourth Day of *May* One thousand eight hundred and sixty-seven.

Assessed Tax on Dogs kept within the Year end-

II. The Duty of Assessed Taxes for or in respect of each Dog kept in *England* within the year ending on the said Fifth Day of *April* One thousand eight hundred and sixty-seven, or kept in *Scotland* within the Year ending on the

ing 5th April 1867 in England, and 24th May 1867 in Scotland, reduced to Seven Shillings.

said Twenty-fourth Day of *May* One thousand eight hundred and sixty-seven, is hereby reduced to Seven Shillings in lieu of Twelve Shillings now payable; and no Person shall be chargeable with Duty to any greater Amount than Twenty-three Pounds Two Shillings for any Number of Hounds, or Five Pounds Five Shillings for any Number of Greyhounds, kept by him in such Years respectively.

After 5th April 1867 the Duties of Excise herein named to be paid on Dogs.

III. In lieu of the said Duties of Assessed Taxes, there shall be granted and charged in respect of Dogs kept in *England* after the said Fifth Day of *April* One thousand eight hundred and sixty-seven, or kept in *Scotland* after the said Twenty-fourth Day of *May* One thousand eight hundred and sixty-seven, the following Duties, to be paid annually upon the taking out of the Licences herein-after mentioned:

For and in respect of every Dog, of whatever Description or Denomination, for which a Licence to keep the same shall be taken out under this Act, the annual Duty of Five Shillings, to be paid by the Person who shall keep such Dog.

Duties and Licences to be under the Management of the Commissioners of Inland Revenue.

IV. The said Duties and Licences shall be Excise Duties and Licences, and shall be under the Management of the Commissioners of Inland Revenue; and all the Powers, Provisions, Clauses, Regulations, and Directions contained in any Act relating to Excise Duties or Licences, or to Penalties under Excise Acts, and now or hereafter in force, shall respectively be of full Force and Effect with respect to the Duties hereby granted, and the Licences relating thereto, and the Penalties hereby imposed, so far as the same are applicable, and shall be observed, applied, and enforced for and in the collecting, regulating, and recovering of the Duties hereby granted, and the Licences relating thereto, and the Penalties hereby imposed, and otherwise in relation to the said Duties, Licences, and Penalties, so far as the same shall be consistent with and not superseded by the express Provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted with reference to the said last-mentioned Duties, Licences, and Penalties respectively: Provided that nothing herein contained shall authorize the granting of a Licence under this Act upon Payment of a less Sum than the Duty for a whole Year.

Licences to be in such Form as the Commissioners shall direct.

V. The Licences to be taken out under this Act shall be in such Form and shall be granted by such Officers of Inland Revenue as the Commissioners of Inland Revenue shall direct; and every Licence shall commence on the Day on which the same shall be granted, and shall terminate on the Thirty-first Day of *December* following.

Register of Licences to be kept.

VI. Every Officer who shall be authorized to grant Licences under this Act shall keep a Register of all such Licences granted by him, specifying the Name and Place of Abode of every Person licensed, and the Number of Dogs which each Person shall be licensed to keep; and any Justice of the Peace, or Constable or other Officer of the Peace, may at any convenient Time inspect the Register of Licences granted for the current or preceding Year.

Commissioners to cause Notices to be fixed on Church Doors.

VII. The Commissioners of Inland Revenue shall cause to be placed upon or near to the Door of every Church in *Great Britain* a printed or written Notice stating from whom Licences to keep Dogs can be obtained by Persons residing in the Parish or Place in which such Church is situated; and every such Notice shall be kept affixed upon or near to the Door of such Church for such Time as the said Commissioners shall direct: Provided that no Proceeding of any Kind, nor any Act done by any Person in pursuance of this Act, shall be deemed to be invalid or unlawful by reason of such Notice not having been placed or kept affixed as aforesaid.

Penalty for keeping a Dog without a Licence; who shall be deemed the Keeper of a Dog.

VIII. If any Person shall keep a Dog without having in force a Licence granted under this Act authorizing him so to do, or shall keep a greater Number of Dogs than he shall be licensed to keep, he shall for every such Offence forfeit the sum of Five Pounds; and every Person in whose Custody, Charge, or Possession, or in whose House or Premises, any Dog shall be found or seen, shall be deemed to be the Person who shall keep such Dog, unless the contrary be proved, and the Owner or Master of Hounds shall be deemed to be the Person keeping the same.

Penalty for not producing Licence.

IX. If any Person who shall have taken out a Licence under this Act shall not produce and deliver such Licence to be examined and read by any Officer of Excise or Police Constable within a reasonable Time after such Officer shall request the Production of the same, he shall forfeit the Sum of Five Pounds.

No Dogs under Six Months old to pay Duty.

X. The Duties imposed by this Act shall not be payable in respect of any Dog under the Age of Six Months.

CAP. X.

An Act to amend the Law relating to the Duties and Drawbacks on Sugar.—[5*th* April 1867.]

WHEREAS by a Convention between Her Majesty, the King

of the *Belgians*, the Emperor of the *French*, and the King of the *Netherlands*, signed at *Paris* the Eighth Day of *November* One thousand eight hundred and sixty-four, certain Articles were entered into between the said High Contracting Parties with reference to the Duties and Drawbacks on Sugar, which it is thereby stipulated shall be regulated according to the Proportions mentioned therein, and also in a certain Declaration of the Plenipotentiaries of the said High Contracting Parties made at *Paris* the Twentieth Day of *November* One thousand eight hundred and sixty-six, and for the Period and in the Manner mentioned in the said Convention:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Customs Duties on Sugar.

I. On and after the First Day of *May* One thousand eight hundred and sixty-seven, in lieu of the Duties of Customs now charged on the under-mentioned Articles, the following Duties of Customs shall be charged thereon, on Importation into *Great Britain* or *Ireland*; (that is to say,)

Sugar, *viz.*:	£	s.	d.
Candy, Brown or White, refined Sugar, or Sugar rendered by any Process equal in Quality thereto, and Manufactures of refined Sugar - - - the Cwt.	0	12	0
Sugar not equal to refined, *viz.*:			
First Class - - - the Cwt.	0	11	3
Second Class - - - the Cwt.	0	10	6
Third Class - - - the Cwt.	0	9	7
Fourth Class, including Cane Juice the Cwt.	0	8	0
Molasses - - - the Cwt.	0	3	6

Drawbacks on refined Sugar.

II. On and after the First Day of *May* One thousand eight hundred and sixty-seven, in lieu of the Drawbacks now allowed thereon, the following Drawbacks shall be paid and allowed on the under-mentioned Descriptions of Sugar refined in *Great Britain* or *Ireland* on the Exportation thereof to Foreign Parts, or on Removal to the *Isle of Man* for consumption there, or on Deposit in any approved Warehouse, upon such Terms and subject to such Regulations as the Commissioners of Customs may direct for Delivery from such Warehouse as Ship's Stores only, or for the Purpose of Sweetening *British* Spirits in Bond; (that is to say,)

	£	s.	d.
Upon refined Sugar in Loaf complete and whole, or Lumps duly refined, having been perfectly clarified and thoroughly dried in			

the Stove, and being of an uniform Whiteness throughout; and upon such Sugar pounded, crushed, or broken in a Warehouse approved by the Commissioners of Customs, such Sugar having been there first inspected by the Officers of Customs in Lumps or Loaves as if for immediate Shipment, and then packed for Exportation in the Presence of such Officers, and at the Expense of the Exporter; and upon Candy and also upon Sugar refined by the centrifugal or by any other Process, and not in any way inferior to the Export Standard Sample No. 1. approved by the Lords of the Treasury for every Cwt.	0	12	0
Upon refined Sugar unstoved, pounded, crushed, or broken, and not in any way inferior to the Export Standard Sample No. 2. approved by the Lords of the Treasury, and which shall not contain more than Five *per Centum* of Moisture over and above what the same would contain if thoroughly dried in the Stove - for every Cwt.	0	11	5
Upon other refined Sugar unstoved, being Bastards or Pieces, ground, powdered, or crushed:			
—— Not in any way inferior to the Export Standard Sample No. 3. approved by the Lords of the Treasury for every Cwt.	0	11	3
—— Not in any way inferior to the Export Standard Sample No. 4. approved by the Lords of the Treasury for every Cwt.	0	10	6
—— Not in any way inferior to the Export Standard Sample No. 5. approved by the Lords of the Treasury for every Cwt.	0	9	7
—— Inferior to the above last-mentioned Standard Sample - for every Cwt.	0	8	0

Commissioners of Customs to provide Standard Samples of Sugar for assessing Duties and allowing Drawback.

III. For facilitating the due Assessment of the Duties and the Allowance of Drawbacks on Sugar with reference to Colour, Grain, or Saccharine Matter, considered collectively as they affect the general Quality of the Sugar, the Commissioners of Customs shall provide and renew from Time to Time One or more Sample or Samples of each of the respective Qualities according to which Sugar may be chargeable with duty upon Importation into *Great Britain* or *Ireland*, and according to which the several Rates of Drawback shall be allowed as specified herein on the respective Descriptions of refined Sugar on the Exportation

or Removal or Deposit thereof in Warehouse, such Samples to be approved by the Lords Commissioners of Her Majesty's Treasury, and when so approved shall be deemed to be Standard Samples for the Purpose of Assessing the Duty upon Sugar, or for allowing the Drawback thereon, according as it may be equal to any of such Samples on comparison therewith by the Proper Officer of Customs; and no Sugar shall be chargeable with the Duty payable, nor shall any Drawback be allowed, in respect of any particular Quality or Description of Sugar in respect of which a Sample for assessing the Duty or allowing the Drawback, as the Case may be, is provided as aforesaid, unless such Sugar shall be equal to such Sample.

Excise Duties on Sugar.

IV. On and after the First Day of *May* One thousand eight hundred and sixty-seven, in lieu of the Duties of Excise now chargeable on Sugar made in the United Kingdom, the following Duties of Excise shall be charged thereon; (that is to say,)

Candy, Brown or White, refined Sugar, or Sugar rendered by any Process equal in Quality thereto, and Manufactures of refined Sugar - - -	the Cwt.	0	12 0
Sugar not equal to refined, according to the Standard Samples approved by the Lords of the Treasury for assessing the Duties of Customs on Sugar imported into the United Kingdom; *viz.*,			
First Class - -	the Cwt.	0	11 3
Second Class - -	the Cwt.	0	10 6
Third Class - -	the Cwt.	0	9 7
Fourth Class - -	the Cwt.	0	8 0
Molasses - - -	the Cwt.	0	3 6

Duties on Sugar used for Brewing.

V. On and after the First Day of *May* One thousand eight hundred and sixty-seven, in lieu of the Duties of Excise now chargeable for and upon every Hundredweight (and so in proportion for any greater or less Quantity than a Hundredweight) of all Sugars which shall be used by any Brewer of Beer for Sale in the brewing or making of Beer, there shall be charged and paid the Excise Duty of Three Shillings and Sixpence.

Provisions of former Acts to apply to this Act.

VI. All the Powers, Provisions, Clauses, Regulations, Forfeitures, Pains, and Penalties contained in or imposed by any Act or Acts relating to any Duties of the same Kind or Description as the several Duties granted by this Act, and in force at the Time of the passing of this Act, and not hereby expressly repealed, shall be in full Force and Effect with respect to the Duties granted by this Act respectively, so far as the same are or shall be applicable, in all Cases

not hereby expressly provided for, and shall be observed, applied, enforced, and put in Execution for and in the raising, levying, collecting, and securing such Duties, and otherwise in relation thereto, so far as the same shall not be superseded by and shall be consistent with the express Provisions of this Act, as fully and effectually to all Intents and Purposes as if the same had been herein repeated and specially enacted, *mutatis mutandis*, with reference to the Duties granted by this Act respectively.

CAP. XV.

An Act for the Abolition of Certain Exemptions from Local Dues on Shipping and on Goods carried in Ships.—[12*th* April 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short Title.

I. This Act may be cited for all Purposes as "The Shipping Dues Exemption Act, 1867."

Commencement of Act.

II. This Act shall come into operation on the First of *August* One thousand eight hundred and sixty-seven, which Time is herein referred to as the Commencement of this Act.

Interpretation of Terms:

III. The following Words and Expressions shall in this Act have the Meanings hereby assigned to them, unless there is something in the Context inconsistent with such Meanings; that is to say,

"Dues:"

The Word "Dues" shall include all Tolls, Rates, Taxes, Duties, and Imposts levied on Ships or on Goods carried in Ships, except any Duties levied by the Commissioners of Customs for the Use of Her Majesty:

"Exemption from Dues."

The Expression "Exemption from Dues" shall, in addition to its ordinary Meaning, include every Privilege of paying smaller Dues than the Public at large pay under like Circumstances.

No Exemption from Dues allowed in United Kingdom on account of Reasons herein named.

IV. After the Commencement of this Act no Exemption from Dues shall be allowed in the United Kingdom on account of any one or more of the following Reasons; that is to say,

(1.) On account of any Ship being registered at or belonging to any particular Country, Port, or Place, or trading between any particular Ports or Places:

(2.) On account of any Ship or Goods being the Property of, or being consigned by or to any particular Person or Body Corporate:

(3.) On account of any Goods being destined for Sale in any particular Town, Place, or Market:

(4.) On account of any Ship or Goods being sent to or from, or anchoring or mooring at, or being laden or unladen at any particular Place in any Port, or in the Neighbourhood of any Port, except where a Ship in going to or from, or anchoring or mooring at, or being laden or unladen at such Place derives from the Expenditure of the Class of Dues in question no Benefit, or less Benefit than Ships going to or from, or anchoring or mooring at, or being laden or unladen at another Place in the same Port:

(5.) On account of any Goods being the Product of or being destined for Use at any particular Manufactory, Place, or District, or any particular Class of Manufactories: Provided that nothing in this Act contained shall affect any Exemption from Dues which has been granted by an Act of Parliament to the Owner or Occupier of some particular Quay, Manufactory, or Place as Compensation for Obstruction to his Water Frontage or Access to his Premises, or other Injury caused to him by the Works authorized by such Act.

Privileged Persons to have as Compensation an Annuity for 10 Years, equal to the Average of Benefit for Three Years preceding 1st February 1867.

V. Where a Person or Body Corporate who would if this Act had not passed be entitled in his or their own Right to derive Profit from any Exemption from Dues abolished by this Act has derived pecuniary Profit from such Exemption during the year preceding the First of *February* One Thousand eight hundred and sixty-seven, in that, but in no other Case, the Person or Body Corporate entitled to receive the Class of Dues in question (in this Act referred to as "the Receiver of Dues") shall pay to the Person or Body Corporate so entitled (in this Act referred to as "the Claimant") by way of Compensation an Annuity equal to the average annual Amount of Profit so derived during the Three Years next preceding the first of *February* One thousand eight hundred and sixty-seven, or during so much of those Three Years as is subsequent to the Date at which the Claimant commenced to derive such Profit:

No Compensation to be paid after Times herein named.

Provided that no Compensation shall be payable or paid (except so much as may previously have accrued) after any of the following Times; *viz.*,

(1.) After the Expiration of Ten Years from the Commencement of this Act:

(2.) After the Time of the Death of the Claimant:

(3.) After the Time at which the Dues from which the Claimant was exempted cease to be levied:

(4.) After any Time when from any Reason whatever the Claimant ceases or would cease (if the Exemption from Dues for which Compensation was granted then existed) to have a Right to such Exemption or to be in a Position to derive Profit from it.

Mode of determining Amount of Compensation.

VI. With respect to determining the Amount of Compensation to be paid under this Act, the following Rules shall be observed:

(1.) The Claimant shall send to the Receiver of Dues and to the Board of Trade in Writing his Claim to Compensation, stating the Amount and Grounds of his Claim, and shall give such Evidence in support of his Claim as the Board of Trade may require:

(2.) This Claim shall be sent in to the Board of Trade within Three Months after the Commencement of this Act, and if it is not sent in within that Time the Claimant shall not be entitled to any Compensation in respect of the Time prior to the Date of the Receipt of such Claim by the Board of Trade; and if it is not sent in within One Year after the passing of this Act the Claimant shall not be entitled to any Compensation:

(3.) As soon as may be after receiving such Claim, the Receiver of Dues shall agree with the Claimant on the Amount of the Compensation to be paid, and the Times and Mode of such Payment, but such Agreement shall be subject to the Approval of the Board of Trade:

(4.) If no Agreement can be made, or if the Board of Trade disapprove of any Agreement which is made, the Amount of Compensation to be paid, and the Times and Mode of such Payment, shall be determined by Arbitration:

(5.) For the Purpose of such Arbitration the Clauses of "The Companies Clauses Consolidation Act, 1845," with respect to the Settlement of Disputes by Arbitration, shall be incorporated with this Act, and in the Construction of those Clauses for the Purposes of this Act this Act shall be deemed to be the Special Act, and any Appointment of an Arbitrator by the Receiver of Dues shall be subject to the Approval of the Board of Trade.

Commencement of Compensation, and how to be paid.

VII. The Compensation shall (except as in this Act mentioned) date from the Commencement of this Act, and shall be paid out of the Class of Dues from which the Claimant who receives it was previously exempted.

Power to

VIII. Any Receiver of Dues, on Agreement with the

commute Annuity for a Principal Sum.

Claimant and with the Approval of the Board of Trade, may, by paying to the Claimant a Principal Sum, commute any Compensation payable annually by such Receiver under this Act.

Power to Receiver of Dues to borrow for Purpose of Commutation of the annual Payment.

IX. Where the Receiver of Dues commutes the annual Compensation by payment of a Principal Sum he may, if the Board of Trade approve, notwithstanding any Limitation in any Act of Parliament or Charter, borrow at Interest on the Security of any Dues which he has Power to levy the whole or any Part of such Principal Sum, and shall apply the same in effecting such Commutation.

For the Purpose of such borrowing the Clauses of "The Commissioners Clauses Act, 1847," with respect to the Mortgages to be executed by the Commissioners, shall be incorporated with this Act, and in the Construction of that Clause for the Purpose of this Act this Act shall be deemed to be the Special Act, and the Receiver of Dues which is borrowing shall be deemed to be the Commissioners.

If beneficial to the Trade of the Port, the Dues may be abolished instead of the Exemption.

X. Where a Receiver of Dues in any Port or Place proves to the Satisfaction of the Board of Trade that it would be beneficial to the Trade of such Port or Place that the Class of Dues from which the Exemption exists should be abolished, the Board of Trade may make an Order directing the Abolition of that Class of Dues after the Date mentioned in the Order, and after such Date, or, if no Date is mentioned, after the Date of that Order, no Dues specified in such Order shall be levied, and no Compensation shall be payable in respect of any Exemption therefrom; provided that where such Dues are received in trust for a Body Corporate such Dues shall not be abolished without the Consent of such Body Corporate under their Common Seal.

Saving of Rights of Her Majesty and Lighthouse Authorities.

XI. Nothing in this Act contained shall render liable any Ships or Goods which belong to or are in the Service of Her Majesty, or any Corporation having the Superintendence or Management of Lighthouses, to any Dues to which they would not be liable if this Act had not been passed.

CAP. XVII.

An Act to regulate the Court and Office of the Lyon King of Arms in Scotland, *and the Emoluments of the Officers of the same.* [3d May 1867.]

WHEREAS it is expedient to regulate the Court and Office of the Lyon King of Arms in *Scotland*, and the Emoluments of the Officers of the same:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Lyon King of Arms to have same Rights and Duties as heretofore, except as altered by this Act.

I. From and after the passing of this Act the Jurisdiction of the Lyon Court in *Scotland* shall be exercised by the Lyon King of Arms, who shall have the same Rights, Duties, Powers, Privileges, and Dignities as have heretofore belonged to the Lyon King of Arms in *Scotland*, except in so far as these are hereinafter altered or regulated.

Lyon King of Arms to discharge his Duties personally.

II. The Lyon King of Arms shall be bound to discharge the Duties of his Office personally and not by deputy: Provided always, that in the event of the temporary Absence of the Lyon King of Arms, from Illness or other necessary Cause, it shall be lawful for the Lord President of the Court of Session to grant a Commission to some other Person to discharge the Duties of Lyon King of Arms *ad interim*, and such Commission shall not be liable to any Stamp Duty: And provided also, that without any such Commission, in the event of the temporary Absence or Incapacity of the Lyon King of Arms, the Lyon Clerk shall be and is hereby empowered to admit to the Office of Messenger at Arms Persons properly qualified according to the present Law and Practice.

Salary of Lyon King of Arms.

III. The Lyon King of Arms, who shall be appointed by Her Majesty, Her Heirs and Successors, shall receive such Salary, not exceeding Six hundred Pounds *per Annum*, as the Commissioners of Her Majesty's Treasury shall from Time to Time approve, payable quarterly out of any Monies to be voted by Parliament for that Purpose, which Salary shall come in place of the Fees hitherto exigible by him, to which he shall no longer be entitled.

Rights and Duties of Lyon Clerk.

IV. The Lyon Clerk shall hereafter have the same Rights and perform the same Duties as heretofore, except in so far as the same are herein-after altered or regulated.

Lyon Clerk to perform his Duties personally.

V. The Lyon Clerk, who shall be appointed by Her Majesty, Her Heirs and Successors, shall, subject to the Provision contained in the Twelfth Section of this Act, perform the Duties of his Office personally and not by Deputy, and shall receive such Salary, not exceeding Two hundred and fifty Pounds *per Annum*, as the Commissioners of Her Majesty's Treasury shall from Time to Time approve, payable as aforesaid, which Salary shall come in place of the Fees hitherto exigible by him, to which he shall no longer be entitled: Provided always, that in the event of the temporary Absence or Incapacity of the Lyon Clerk it shall be lawful for the Lyon King of Arms, with

Salary of Lyon Clerk.

the Consent of Her Majesty's Advocate, to grant a Commission to some other Person to discharge the Duties of the Lyon Clerk *ad interim*, and such Commission shall not be liable to any Stamp Duty.

Rights and Duties of Heralds and Pursuivants in Scotland.

VI. The Heralds and Pursuivants in *Scotland* shall be appointed by the Lyon King of Arms, and shall have the same Rights and Privileges and discharge the same duties as heretofore, except in so far as altered or regulated by this Act.

As to filling up Vacancies in the Offices of Herald and Pursuivant.

VII. No Vacancy in the Office of Herald in *Scotland* shall be filled up by the Lyon King of Arms until the Number of Heralds has, by Death, Resignation, or Removal, fallen to below Three, after which Event the Vacancies which may occur in said Office shall be filled up, so that the Number of Heralds shall in Time coming be maintained at Three; and no Vacancy in the Office of Pursuivant in *Scotland* shall be filled up by the Lyon King of Arms until the Number of Pursuivants has, by Death, Resignation, or Removal, fallen to below Three, after which event the Vacancies which may occur in said Office shall be filled up, so that the Number of Pursuivants shall in Time coming be maintained at Three: Provided always, that no Herald or Pursuivant appointed before the passing of this Act shall in respect of any vacancy not being filled up be entitled to any larger Share of Fees than he would have been entitled to had there been no such Vacancy.

Salary of Heralds and Pursuivants.

VIII. No Herald or Pursuivant appointed after the passing of this Act shall be entitled to exact any Fees, but each Herald or Pursuivant so appointed shall receive, in lieu of Fees, such Salary as the Commissioners of Her Majesty's Treasury shall from Time to time approve, payable as aforesaid: Provided always, that no Herald or Pursuivant appointed after the passing of this Act shall pay or give to the Lyon King of Arms any Consideration for his appointment, and if any such Consideration shall have been paid or given by any such Herald or Pursuivant his Appointment shall be null and void.

Duties and Fees of Herald Painter and Procurator Fiscal of Lyon Court.

IX. The Herald Painter in *Scotland* and Procurator Fiscal of the Lyon Court shall hereafter be appointed by the Lyon King of Arms, and shall respectively perform the Duties, and be entitled to receive the Fees, which the Herald Painter and Procurator Fiscal aforesaid have hitherto been bound to perform and entitled to exact: Provided always, that no Herald Painter or Procurator Fiscal shall have any vested Right in such Fees.

Attendance at Lyon Office.

X. From the First Day of *October* to the Twentieth Day of *December* and from the Fifth Day of *January* to the Twentieth Day of *July* in each Year the Hours of At-

tendance at the Lyon Office shall be from Eleven o'Clock in the Forenoon to Three o'Clock in the Afternoon, every lawful Day except *Saturday*; and from the Twenty-first Day of *July* to the Thirtieth Day of *September* and from the Twenty-first Day of *December* to the Fourth Day of *January* in each Year the Hours of Attendance shall be from Eleven o'Clock in the Forenoon to Two o'Clock in the Afternoon, and on *Wednesdays* and *Fridays* only: Provided always, that between the Twenty-first Day of *July* and the Thirtieth Day of *September*, and between the Twenty-first Day of *December* and the Fourth Day of *January*, in Each Year, the Lyon King of Arms shall not be bound to entertain any Applications for Grants or Matriculations of Arms, or for recording Pedigrees: Provided also, that there shall be provided for the Lyon King of Arms, the Lyon Clerk, and the Herald Painter, such sufficient Office Accommodation as the Commissioners of Her Majesty's Treasury may determine.

Regulating Disposal of Fees Payable under the Statutes of the Order of the Thistle, and Grant of Geo. II., dated 19th July 1731.

XL The Fees hitherto payable to the Lyon King of Arms by Knights of the Thistle under the Statutes of the Order of the Thistle, and the Fees payable to the Lyon King of Arms in Terms of a Grant of His Majesty King *George* the Second, under the Great Seal of *Great Britain*, of Date the Nineteenth Day of *July* One thousand seven hundred and thirty-one, shall from and after the passing of this Act be paid into Her Majesty's Exchequer; and after the Death, Resignation, or Removal of any of the Heralds or Pursuivants aforesaid appointed prior to the passing of this Act the Proportion of Fees which but for the said Death, Resignation or Removal would have been payable to him or them in Terms of the said Statutes of the Order of the Thistle, or in Terms of the before-mentioned Grant of His Majesty King *George* the Second, shall be paid into Her Majesty's Exchequer, so that after the Death, Resignation, or Removal of all the Heralds and Pursuivants appointed prior to the passing of this Act the whole Sums appointed by the said Statutes of the Order of the Thistle and the said Grant of His Majesty King *George* the Second to be paid to the Heralds and Pursuivants aforesaid shall instead be paid into Her Majesty's Exchequer.

Rights of present Lyon Clerk not to be affected by this Act.

XLI. Until the Death, Resignation, or Removal of the present Lyon Clerk, notwithstanding anything to the contrary contained in this Act, it shall be lawful for him to perform the Duties of his Office as he is authorised by his Commission, and to exact the Fees and Dues hitherto exigible by him.

Fees.

XLII. Until the Occurrence of the next Vacancy in the Office of Lyon Clerk, the Fees and Dues enumerated in

Schedule A. annexed to this Act shall be exigible in lieu of the Fees and Dues hitherto payable to the Lyon King of Arms and Lyon Depute, and shall be paid into Her Majesty's Exchequer; and after the Occurrence of such Vacancy the Fees and Dues enumerated in Schedule B. annexed to this Act shall be exigible in lieu of the Fees and Dues hitherto payable to the Lyon King of Arms, Lyon Depute, and Lyon Clerk, and shall be paid into Her Majesty's Exchequer.

SCHEDULE A.

On Every Patent of Arms with Supporters, . .	£29	8	0
On every Patent of Arms without Supporters, .	13	13	0
On every Matriculation of Arms with Supporters, without a new Patent, ...	6	16	6
On every Matriculation of Arms without Supporters, without a new Patent, ...	4	14	6
On every Matriculation of Arms without a new Patent of Arms, but with a Patent of Supporters, . .	22	1	0
On every Genealogy recorded, . . .	7	17	6
On the Admission of a Messenger at Arms to practise in the County of Edinburgh, ...	11	2	3
On the Admission of a Messenger at Arms to practise out of the County of Edinburgh, . . .	8	6	8
Annual Dues of each Messenger at Arms, . .	0	11	2

N.B.—These Fees are exclusive of Stamp Duties when such are exigible.

SCHEDULE B.

On every Patent of Arms with Supporters, . .	£49	12	0
On every Patent of Arms without Supporters, .	29	18	0
On every Matriculation of Arms with Supporters, without a new Patent, ...	15	16	6
On every Matriculation of Arms without Supporters, without a new Patent, ...	12	0	6
On every Matriculation of Arms without a new Patent of Arms, but with a Patent of Supporters, . .	34	13	6
On every Genealogy recorded, . . .	10	10	0
Additional for each Member of the Pedigree, .	0	5	0
Certificate regarding Change of Surname, . .	0	15	0
Search in Register of Arms, ...	0	5	0
Search in Register of Genealogies, . . .	0	5	0
General Search in Heraldic MSS., . . .	1	1	0
General Search in Genealogical MSS. . .	1	1	0

On every Extract from a Register,	£0	10	6
On entering a Caveat,	0	5	0
On the Admission of a Messenger at Arms to practise in the County of Edinburgh,	19	14	0
On the Admission of a Messenger at Arms to practise out of the County of Edinburgh,	15	14	0
Annual Dues of a Messenger at Arms practising in the County of Edinburgh,	0	17	0
Annual Dues of a Messenger at Arms practising out of the County of Edinburgh,	0	17	6
On Renewal of a Messenger's Bond of Caution,	2	10	0
On recording Resignation or Change of Residence of a Messenger,	0	2	6
On Search for a Messenger's Cautioner,	0	2	6
On every certified Statement of Name and Designation of such Cautioner, and Date of Bond,	0	5	0
On each Petition or Paper lodged in a Process against a Messenger,	0	5	0
On each Interlocutor in a Process against a Messenger,	0	5	0
On extracting each Warrant, Decreet, or Precept of Suspension, first Sheet,	0	5	0
On ditto, each subsequent Sheet,	0	3	0
On affixing Seal of Office to Warrant, Decree, or Precept,	0	5	0
On examining Executions of Service and Intimations of Precepts of Suspension, marking them on the Record and giving out Certificate,	0	5	0
On lending Process and taking Receipt,	0	2	0
On Return of Process and scoring Receipt,	0	1	0
On Re-admission of a Messenger at Arms,	1	0	6
On the Appointment of a Herald,	9	16	4
On the Appointment of a Pursuivant,	9	1	0

N.B.—These Fees are exclusive of Stamp Duties when such are exigible.

CAP. XVIII.

An Act for the Preservation and further Protection of Oyster Fisheries.—[3*d* May 1867.]

WHEREAS it is expedient to make Provision for the Protection of private Oyster Beds, Layings, or Fisheries:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short Title.

I. This Act may be cited as The Oyster Preservation Act, 1867,

As to Words "Oysters" and "Person."

II. In this Act the Word "Oysters" includes the Brood, Ware, Half-ware, Spat, and Spawn of Oysters, and the Word "Person" includes Body Corporate.

Oysters in the Oyster Grounds or Fishery to be Owner's Property.

III. All Oysters being in or on any Oyster Bed, Laying, or Fishery which is the Property of any Person, and is sufficiently marked out or known as such, shall be the absolute Property of such Person, and in all Courts of Law and Equity and elsewhere, and for all Purposes, Civil, Criminal, or other, shall be deemed to be in the actual Possession of such Person.

Oysters removed from the Fishery to be Owner's Property.

IV. All Oysters removed by any Person from any such Oyster Bed, Laying, or Fishery, and not either sold in Market overt, or disposed of by or under the Authority of the Person to whom such Bed, Laying, or Fishery belongs as aforesaid, shall be the absolute Property of such last-mentioned Person, and in all Courts of Law and Equity and elsewhere, and for all Purposes, Civil, Criminal, or other, the absolute Right to the Possession thereof shall be deemed to be in such last-mentioned Person.

Proof of marking of Limits.

V. Whenever it is necessary in any legal Proceeding to prove that the Limits of any Oyster or Mussel Fishery have been duly buoyed or otherwise marked, or that Notices of such Limits have been duly posted, published, or distributed in pursuance of any Act of Parliament or of any Order of the Board of Trade confirmed by Parliament, or that Notice of the Provisions of such Act or Order relating to the Oyster or Mussel Fishery has been duly published, a Certificate purporting to be under the Hand of One of the Secretaries or Assistant Secretaries of the Board of Trade, certifying that the Board of Trade are satisfied that the said Limits were so buoyed or marked, or that the said Notices were duly published, posted, or distributed, shall be received as Evidence that the same have been so buoyed or marked, or that the said Notices have been so published, posted, or distributed.

Contiguous Fisheries.

VI. When Two or more Oyster Beds, Layings, or Fisheries belonging to different Proprietors are contiguous to each other, and any Indictment or Prosecution shall be raised or Proceeding taken against any Person for stealing Oysters from the same, it shall be sufficient, in alleging and proving the Place from which such Oysters were stolen, to allege and prove that they were stolen from one or other of such contiguous Beds, Layings, or Fisheries, and in alleging and proving the Property and lawful Possession of such Oysters it shall be sufficient to allege and prove that the same belonged to and were in the lawful Posses-

sion of one or other of such Proprietors, although it is not alleged or proved from which of such contiguous Beds, Layings, or Fisheries the same were stolen, or of which of such Proprietors they were the Property or in the lawful Possession.

CAP. XXIII.

An Act to grant and alter certain Duties of Customs and Inland Revenue, and for other Purposes relating thereto. —[31*st* May 1867.]

Most Gracious Sovereign,

WE, Your Majesty's most dutiful and loyal Subjects, the Commons of the United Kingdom of *Great Britain* and *Ireland*, in Parliament assembled, towards raising the necessary Supplies to defray Your Majesty's public Expenses, and making an Addition to the Public Revenue, have freely and voluntarily resolved to give and grant unto Your Majesty the several Duties herein-after mentioned; and do therefore most humbly beseech Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Grant of Duties specified in Schedules annexed.

I. There shall be charged, collected, and paid, for the Use of Her Majesty, Her Heirs and Successors, the several Duties of Customs and Inland Revenue respectively specified in the Schedules marked respectively (A.), (B.), and (C.) to this Act; and the said Duties shall respectively take effect at the Dates, and shall continue to be charged, collected, and paid during the Periods respectively specified in that Behalf in the said Schedules respectively, and where no Date is specified for the Commencement of any Duty the same shall commence and take effect from the passing of this Act, and where no Period is specified for the Duration of any Duty the same shall continue to be charged, collected, and paid until Parliament shall otherwise order; and the said Schedules shall be deemed to be Part of this Act.

Provisions of former Acts to apply to Duties under this Act.

II. All the Powers, Provisions, Allowances, Exemptions, Forfeitures, and Penalties contained in or imposed by any Act or Acts, or any Schedule thereto, relating to Customs Duties and Stamp Duties, and in force at the time of the passing of this Act, and relating to the Duty of Income

Tax, and in force on the Fifth Day of *April* One thousand eight hundred and sixty-seven, shall respectively be in full Force as to the said Duties granted by this Act, so far as the same are applicable, and shall be observed, applied, allowed, enforced, and put in execution for and in the raising, levying, collecting, and securing of the said Duties, and otherwise in relation thereto, so far as the same shall not be repealed or superseded by and shall be consistent with the Provisions of this Act, as fully and effectually, to all Intents and Purposes, as if the same had been herein expressly enacted with reference to the said Duties respectively.

AS TO STAMP DUTY ON SEA INSURANCES.

Repeal of Acts in Schedule (D.)

III. On the passing of this Act the Stamp Duties now payable for Policies of Sea Insurance shall cease and determine, and the several Acts and Parts of Acts specified in the Schedule marked (D.) to this Act annexed are hereby repealed, save so far as respects any Policy made prior to the passing of this Act, and as respects any Forfeiture or Penalty incurred in respect of any Offence against any Enactment so repealed.

Interpretation of Terms.

IV. In this Act the Expression "Sea Insurance" means any Insurance (including Re-insurance) made upon any Ship or Vessel, or upon the Machinery, Tackle, or Furniture of any Ship or Vessel, or upon any Goods, Merchandise, or Property, of any Description whatever, on board of any Ship or Vessel, or upon the Freight of or any other Interest which may be lawfully insured in or relating to any Ship or Vessel; and the Word "Policy" means any Instrument whereby a Contract or Agreement for any Sea Insurance is made or entered into.

Commissioners to provide stamped Forms of Policies.

V. The Commissioners of Inland Revenue shall provide Blank Policies printed on Paper, in the Form set forth in Schedule (E.) to this Act, and stamped to denote the Duty payable under this Act; and any Person may buy such Blank Policies, stamped with the Duty which he may require, at the Price of such Duty: Provided always, that before any such stamped Blank Policies shall be issued, and before any Vellum, Parchment, or Paper which may be brought to be stamped shall be delivered out stamped by any Officer of Inland Revenue, he shall mark or write thereon the Day, Month, and Year of such Issue or Delivery, and if he wilfully neglect so to do he shall forfeit the sum of One hundred Pounds.

Office in London for distributing

VI. The said Commissioners shall keep an Office within the City of *London* for the Distribution of Blank Policies, stamped as aforesaid, to Persons carrying on the Business

of Insurance within the said City, and purchasing the same, subject to the usual Allowance made on Purchase of Stamps. stamped Forms of Policies.

VII. No Contract or Agreement for Sea Insurance (other than such Insurance as is referred to in the Fifty-fifth Section of "The Merchant Shipping Act Amendment Act, 1862,") shall be valid unless the same is expressed in a Policy; and every Policy shall specify the Particular Risk or Adventure, the Names of the Subscribers or Underwriters, and the Sum or Sums insured; and in case any of the above-mentioned Particulars shall be omitted in any Policy, such Policy shall be null and void to all Intents and Purposes. Contract for Insurance to be in Writing, and to specify certain Particulars.

VIII. No Policy shall be made for any Time exceeding Twelve Months, and every Policy which shall be made for any Time exceeding Twelve Months shall be null and void to all Intents and Purposes. No Policy to be made for more than Twelve Months.

IX. No Policy shall be pleaded or given in Evidence in any Court, or admitted in any Court to be good or available in Law or in Equity, unless duly stamped; and it shall not be lawful for the said Commissioners or any Officer of Inland Revenue to stamp any Policy at any Time after it is signed or underwritten by any Person, on any Pretence whatever, except in the Two Cases following; that is to say, No Policy valid unless duly stamped.

1st. Any Policy of mutual Insurance having a Stamp or Stamps impressed thereon may, if required, be stamped with an additional Stamp or Stamps, provided that at the Time such additional Stamp or Stamps shall be required the Policy shall not have been signed or underwritten to an Amount exceeding the Sum or Sums which the Stamp or Stamps previously impressed thereon will warrant: Exception in case of certain mutual Insurances;

2nd. Any Policy made abroad, and chargeable with Duty by virtue of the Fifteenth Section of the Act of the Twenty-eighth and Twenty-ninth Years of Her Majesty's Reign, Chapter Ninety-six, may be stamped within the Time specified in that Act. and in case of Policies made abroad.

X. Nothing in this Act shall extend or be construed to extend to prohibit the making of any Alteration which may lawfully be made in the Terms and Conditions of any Policy after the same shall have been underwritten; provided that such Alteration be made before Notice of the Determination of the Risk originally insured and that it shall not prolong the Time covered by the Insurance thereby made beyond the Period of Six Months in the Case of a Policy made for a less Period than Six Months, or beyond the Period allowed by this Act in the Case of a Legal Alterations in Policies may be made under certain Restrictions.

Policy made for a greater Period than Six Months, and that the Articles insured shall remain the Property of the same Person or Persons, and that no additional or further Sum shall be insured by reason or means of such Alteration.

Policies for Voyage and Time chargeable with Two Duties.

XI. Where any Sea Insurance is made for a Voyage and also for Time, or to extend to or cover any Time beyond Twenty-four Hours after the Ship shall have arrived at her Destination and been there moored at Anchor, the Policy shall be chargeable with Duty as a Policy for a Voyage, and also with Duty as a Policy for Time.

As to Insurances by Carriers.

XII. Where any Carrier by Sea or other Person shall, in consideration of any Sum of Money paid or to be paid for additional Freight or otherwise, agree to take upon himself any Risk attending Goods, Merchandise, or Property of any Description whatever while on board any Ship or Vessel, or engage to indemnify the Owner of any such Goods, Merchandise, or Property from any Risk, Loss, or Damage, such Agreement or Engagement shall be deemed to be a Contract for a Sea Insurance.

Penalty on assuring unless Policy duly stamped.

XIII. If any Person shall become an Assurer upon any Sea Insurance, or shall subscribe or underwrite, or otherwise sign or make, or enter into any Contract, Agreement, or Memorandum, for or of any Sea Insurance, or shall receive or contract for any Premium or Consideration for any Sea Insurance, or shall receive or charge, or take Credit in Account for any such Premium or Consideration as aforesaid, or any Sum of Money as or for any such Premium or Consideration as aforesaid, or shall wilfully or knowingly take upon himself any Risk, or render himself liable to pay, or shall pay or allow, or agree to pay or allow, in account or otherwise, any Sum of Money upon any Loss, Peril, or Contingency relative to any Sea Insurance, unless such Insurance shall be written on Vellum, Parchment, or Paper duly stamped or if any Person shall be concerned in any fraudulent Contrivance or Device, or shall be guilty of any wilful Act, Neglect, or Omission, with Intent to evade the Duties payable on Policies under this Act, or whereby the Duties may be evaded, every Person so offending shall for every such Offence forfeit the Sum of One hundred Pounds.

Penalty on Persons effecting Insurance unless duly stamped.

XIV. Every Person who shall make or effect, or knowingly procure to be made or effected, any Sea Insurance, or shall give or pay, or render himself liable to pay, any Sum of Money, Premium, or Consideration whatever in the Nature of a Premium for or upon any Sea Insurance, or shall enter into any Contract or Agreement whatever for any Sea Insurance, unless the same Insurance, Contract

and Agreement for Insurance, respectively, shall be written on Vellum, Parchment, or Paper, being first duly stamped, shall for every such Offence forfeit and pay the Sum of One hundred Pounds; and every Broker, Agent, or other Person negotiating or transacting any Sea Insurance contrary to the true Intent and Meaning of this Act, or writing any Agreement for any Sea Insurance upon Vellum, Parchment, or Paper not duly stamped, shall for every such Offence forfeit the Sum of One hundred Pounds.

Penalty for issuing a Copy of Policy where no Policy.

XV. If any Person shall make or issue, or cause to be made or issued, any Document purporting to be a Copy of a Policy, and there shall not be in existence, at the Time of such making or Issue, a Policy duly stamped whereof the said Document shall be a Copy, he shall for such Offence forfeit the Sum of One hundred Pounds in addition to any other Penalty which he may have incurred under this Act.

Brokerage not to be a legal Charge unless Policy duly stamped.

XVI. It shall not be lawful for any Broker, Agent, or other Person negotiating or transacting or making any Sea Insurance to charge his Employer any Sum of Money for Brokerage or Agency, or for his Pains or Labour in negotiating, transacting, or making such Insurance, or writing the same, or for any Monies expended or paid by way of Premium or Consideration in the Nature of a Premium for such Insurance, unless the same shall be written on Vellum, Parchment, or Paper, duly stamped; and all and every Sum and Sums whatever paid by such Employer on any such Account to any Broker, Agent, or other Person negotiating or transacting or making any Insurance contrary to this Act shall be deemed to be paid without Consideration, and shall remain the Property of such Employer, his Executors, Administrators, or Assigns.

Allowance may be made in the Case specified.

XVII. Where a Policy shall be inadvertently filled up in an incorrect or improper Manner, or be obliterated or otherwise spoiled and rendered unfit for Use, or shall be filled up for some Insurance which shall not be proceeded in, and the same shall not be signed by any Underwriter, but in no other Case, it shall be lawful for the said Commissioners to allow as spoiled, and to cancel, the Stamps on such Policy, provided that Application shall be made for the Allowance within Six Months after such Policy shall be spoiled or become useless; and the Enactments now in force with reference to the Allowance of spoiled Stamps shall, so far as the same are applicable, extend to the Allowance herein-before mentioned.

Officers of Inland Revenue may be

XVIII. The said Commissioners may authorize any Officer or Officers of Inland Revenue to receive and examine the Claims made for such Allowance as aforesaid,

authorized to examine Claims for Allowances.

and to take Affidavits and Affirmations relating thereto, and to administer the proper Oaths and Affirmations for that Purpose, and to do all or any Act or Acts respecting such Claims which the Commissioners themselves are authorized to do.

AS TO INCOME TAX.

Sections 6 & 7 of 29 Vict. c. 36. not to apply, &c.

XIX. Nothing herein contained shall continue or be construed to continue the Provisions contained in the Sixth and Seventh Sections of the Act passed in the Twenty-ninth Year of Her Majesty's Reign, Chapter Thirty-Six; and for the Purposes of this Act the Year One thousand eight hundred and sixty-two mentioned in the Forty-third Section of the Act passed in the Twenty-fifth Year of Her Majesty's Reign, Chapter Twenty-two, shall be read as and deemed to mean the Year One thousand eight hundred and sixty-seven.

SCHEDULE (A.)

CONTAINING the DUTIES of CUSTOMS granted by this Act.

The Duties of Customs now charged on Tea shall continue to be levied and charged—

On and after the First Day of August One thousand eight hundred and sixty-seven until the First Day of August One thousand eight hundred and sixty-eight, on the Importation thereof into Great Britain and Ireland; that is to say,

		£	s.	d.
Tea, - - - - - -	the lb.	0	0	6

SCHEDULE (B.)

CONTAINING the STAMP DUTIES granted by this Act.

	s.	d.
For every Policy of Sea Insurance for or upon any Voyage—		
In respect of every full Sum of One hundred Pounds and in respect of any fractional Part of One hundred Pounds thereby insured - - - -	0	3
For every Policy of Sea Insurance for Time—		
In respect of every full Sum of One hundred Pounds and in respect of any fractional Part of One hundred Pounds thereby insured—		
Where the Insurance shall be made for any Time not exceeding Six Months - - -	0	3

Where the Insurance shall be made for any Time exceeding Six Months and not exceeding Twelve Months - - - - - 0 6

But if the separate and distinct Interests of Two or more Persons shall be insured by One Policy for a Voyage or for Time, than the Duty of Threepence or the Duty of Threepence or Sixpence, as the Case may require, shall be charged thereon in respect of every full Sum of One hundred Pounds and every fractional part of One hundred Pounds, thereby insured upon any separate or distinct Interest.

SCHEDULE (C.)

CONTAINING the Duties of INCOME TAX granted by this Act.

For One Year commencing on the Sixth Day of April One thousand eight hundred and sixty-seven, for and in respect of all Property, Profits, and Gains mentioned or described as chargeable in the Act passed in the Sixteenth and Seventeenth Years of Her Majesty's Reign, Chapter Thirty-four, for granting to Her Majesty's Duties on Profits arising from Property, Professions, Trades, and Offices, the following Duties shall be charged; (that is to say,)

For every Twenty Shillings of the annual Value or Amount of all such Property, Profits, and Gains (except those chargeable under Schedule (B.) of the said Act), the Duty of Fourpence:

And for and in respect of the Occupation of Lands, Tenements, Hereditaments, and Heritages chargeable under Schedule (B.) of the said Act, for every Twenty Shillings of the annual Value thereof—

In England the Duty of Twopence:

And in Scotland and Ireland respectively the Duty of One Penny Halfpenny:

Subject to the Provisions contained in Section Three of the Act Twenty-sixth Victoria, Chapter Twenty-two, for the Exemption of Persons whose whole Income from every Source is under One hundred Pounds a Year, and Relief of those whose Income is under Two hundred Pounds a Year.

SCHEDULE (D.)

CONTAINING the ENACTMENTS repealed by this Act.

Session and Chapter.	Title or abbreviated Title.	Extent of Repeal.
11 Geo. 1. c. 30. -	An Act for more effectual preventing Frauds and Abuses in the Publick Revenues, &c., &c.	Section 44.

Session and Chapter.	Title or abbreviated Title.	Extent of Repeal.
19 Geo. 2. c. 37. -	An Act to regulate Insurance on Ships belonging to the Subjects of Great Britain, and on Merchandise or effects laden thereon.	Section 4.
35 Geo. 3. c. 63. -	An Act for granting to His Majesty certain Stamp Duties on Sea Insurances.	The whole Act.
39 & 40 Geo. 3. c. 72.	An Act to amend several Laws relating to the Duties on stamped Vellum, Parchment, and Paper.	Sections 8, 9, 10, 11, and 12.
54 Geo. 3. c. 133. -	An Act for enabling the Commissioners of Stamps to make Allowances for spoiled Stamps on Policies of Insurance in Great Britain, and for preventing Frauds relating thereto.	The whole Act.
54 Geo. 3. c. 144. -	An Act for better securing the Stamp Duties on Sea Insurances made in London, &c. &c.	The whole Act, except Sections 13 and 14.
9 Geo. 4. c. 49. -	An Act to amend the Laws in force relating to the Stamp Duties on Sea Insurances, &c. &c.	Section 1.
5 & 6 Vict. c. 82. -	An Act to assimilate the Stamp Duties in Great Britain and Ireland, and to make Regulations for collecting and managing the same until the 10th Day of October 1845.	Sections 22, 23, 24, 25, 26, 27, 28, 29, and 30.
7 Vict. c. 21. - -	An Act to reduce the Stamp Duties on Policies of Sea Insurance, &c. &c.	Sections 4 and the Schedule.
27 & 28 Vict. c. 56.	An Act for granting to Her Majesty certain Stamp Duties, and to amend the Laws relating to the Inland Revenue.	Section 1.
28 & 29 Vict. c. 96. -	An Act to amend the Laws relating to the Inland Revenue.	Sections 8 and 9.

CAP. XXVII.

An Act to allow Warehoused British *Spirits to be bottled for Home Consumption.* [17th June 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

British Spirits in Customs or Excise Warehouse may be bottled for Home Consumption.

I. Any plain *British* Spirits or compounded *British* Spirits deposited in an Excise Warehouse may be removed, bottled, and packed for Home Consumption under and subject to the same Provisions and Regulations as are contained in or authorised by the Act of the Twenty-seventh Year of Her Majesty's Reign, Chapter Twelve, in relation to bottling and packing plain *British* Spirits for Exportation or for Use as Ships Stores; and any plain *British* Spirits or compounded *British* Spirits deposited in a Customs Warehouse may be bottled and packed for Home Consumption under the Provisions of the Act or Acts relating to the bottling of Spirits for Exportation, and subject to such Regulations as the Commissioners of Customs shall from Time to Time prescribe; and all Spirits bottled and packed as aforesaid may, under such Regulations as the Commissioners of Customs and Inland Revenue respectively shall appoint, be delivered for Home Consumption upon payment of the proper Duty of Excise, according to the Quantity and Strength of such Spirits at the Time of bottling the same.

Duty to be paid upon Deficiency found on bottling Spirits.

II. Duty shall be paid upon any Deficiency which shall be found in the Quantity of any plain or compounded *British* Spirits bottled in any Customs Warehouse over and above the Rate of Two *per Cent.* specified in the Second Section of the Act of the Twenty-seventh *Victoria*, Chapter Twelve.

Duties on British Spirits delivered from Customs Warehouse to be collected by Officers of Customs.

III. In all Cases where *British* Spirits bottled and packed as aforesaid shall be delivered for Home Consumption from a Customs Warehouse, or where duty shall be payable on any Deficiency as aforesaid, the Excise Duty shall be collected by the Officers of Customs, and shall be accounted for and paid over in the same Manner as is now by Law directed in the Case of Excise Duty payable on any *British* Spirits delivered out of a Customs Warehouse Home Consumption.

Quantities in which British Spirits may

IV. No Distiller shall sell or remove for Home Consumption any *British* Spirits in Bottle in a less Quantity than Five Dozen Imperial or reputed Quart Bottles, or

be delivered for Home Consumption.

Ten Dozen Imperial or reputed Pint Bottles, properly packed and secured in Cases, each Case to contain any Number of Dozens of such Bottles, but not less than One Dozen Quarts or Two Dozen Pints, unless he shall have in force a Licence as a Dealer in Spirits under the Laws of Excise, and no *British* Spirits in Bottle shall be delivered for Home Consumption in a less Quantity than One Dozen Imperial or reputed Quart Bottles, or Two Dozen Imperial or reputed Pint Bottles, packed and secured as aforesaid.

Spirits sweetened in Customs Warehouse, and Spirits of Wine deposited therein, not to be delivered for Home Consumption.

V. Nothing in this Act contained shall authorize the Delivery for Home Consumption of any *British* Spirits to which any sweetening or colouring Matter or other Ingredient has been added in a Customs Warehouse, or of any Spirits of Wine upon which a Drawback of the Duty of Excise has been paid upon the Deposit of the same in a Customs Warehouse.

Section 6 of 28 & 29 Vict. c. 98. to apply to bottled compounded Spirits.

VI. The Provisions of Section Six of the Act Twenty-eighth and Twenty-ninth *Victoria*, Chapter Ninety-eight, and the Enactment therein referred to, shall apply to all bottled compounded *British* Spirits delivered out of a Customs or Excise Warehouse for Home Consumption.

CAP. XXVIII.

An Act to amend "The Labouring Classes Dwellings Acts, 1866." [17th June 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short Title.

I. This Act may be cited as "The Labouring Classes Dwelling Houses Act, 1867."

Defining Meaning of certain Terms in 29 & 30 Vict. cc. 28 and 44.

II. In the Fourth Section of "The Labouring Classes Dwelling Houses Act, 1866," the Words "Land or Dwellings for the Purposes of which the Advance is made," and in the Twelfth Section of "The Labouring Classes Lodging Houses and Dwellings Act (*Ireland*), 1866," the Words "Lands, Buildings, or Premises for the Purpose of which such Advance shall be made," shall respectively be construed to include any Land, Buildings, or Premises held together with and for the same Estate and Interest as the Lands, Buildings, or Premises upon which the Money advanced is to be expended under the Provisions of the said Acts respectively.

In case of Advances to Company, Part of whose Capital is unpaid, Loan Commissioners may dispense with Mortgage.

III. In the Case of an Advance under the Provisions of either of the said Acts to a Company or Society, any Part of whose Capital remains uncalled up or unpaid, it shall be lawful, in *England* for the Public Works Loan Commissioners, and in *Ireland* for the Public Works Commissioners, to dispense with a Mortgage of such Capital remaining uncalled up or unpaid, or of such Part thereof as they may think fit.

Extending 29 & 30 Vict. c. 28. to Scotland.

IV. Notwithstanding the Fifty-third Section of "The Labouring Classes Lodging Houses Act, 1851," all the Provisions of "The Labouring Classes Dwelling Houses Act, 1866," so far as they are applicable to *Scotland*, shall be deemed and construed to extend and apply to *Scotland*.

CAP. XXIX.

An Act to amend the Law in respect of the Sale and Purchase of Shares in Joint Stock Banking Companies. [17th June 1867.]

WHEREAS it is expedient to make Provision for the Prevention of Contracts for the Sale and Purchase of Shares and Stock in Joint Stock Banking Companies of which the Sellers are not possessed or over which they have no Control:

May it therefore please Your Majesty that it may be enacted; and be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same:

Contracts for Sale, &c. of Shares to be void unless the Numbers by which such Shares are distinguished are set forth in Contract.

I. That all Contracts, Agreements, and Tokens of Sale and Purchase which shall, from and after the First Day of *July* One thousand eight hundred and sixty-seven, be made or entered into for the Sale or Transfer, or purporting to be for the Sale or Transfer, of any Share or Shares, or of any Stock or other Interest, in any Joint Stock Banking Company in the United Kingdom of *Great Britain* and *Ireland* constituted under or regulated by the Provisions of any Act of Parliament, Royal Charter, or Letters Patent, issuing Shares or Stock transferable by any Deed or written Instrument, shall be null and void to all Intents and Purposes whatsoever, unless such Contract, Agreement, or other Token shall set forth and designate in Writing such Shares, Stock, or Interest by the respective Numbers by which the same are distinguished at the making of such Contract, Agreement, or Token on the Register or

Books of such Banking Company as aforesaid, or where there is no such Register of Shares or Stock by distinguishing Numbers, then unless such Contract, Agreement, or other Token shall set forth the Person or Persons in whose Name or Names such Shares, Stock, or Interest shall at the Time of making such Contract stand as the registered Proprietor thereof in the Books of such Banking Company; and every Person, whether Principal, Broker, or Agent, who shall wilfully insert in any such Contract, Agreement, or other Token any false Entry of such Numbers, or any Name or Names other than that of the Person or Persons in whose Name such Shares, Stock, or Interest shall stand as aforesaid, shall be guilty of a Misdemeanor, and be punished accordingly, and, if in *Scotland*, shall be guilty of an Offence punishable by Fine or Imprisonment.

Registered Shareholders may see Lists.

II. Joint Stock Banking Companies shall be bound to show their List of Shareholders to any registered Shareholder during Business Hours, from Ten of the Clock to Four of the Clock.

Extent of Act limited.

III. This Act shall not extend to Shares or Stock in the Bank of *England* or the Bank of *Ireland*.

CAP. XXXVII.

An Act to amend and consolidate the Public Libraries Acts (Scotland).—[15th July 1867.]

WHEREAS it is expedient to amend and consolidate the Public Libraries Acts relating to *Scotland*, and to give greater Facilities for the Formation and Establishment there of Public Libraries, Art Galleries, and Museums:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

17 and 18 Vict. c. 64, and so much of 29 and 30 Vict. c. 114, as relates to Scotland repealed.

I. The Public Libraries Act (*Scotland*), 1854, and so much of the Public Libraries Amendment Act (*England* and *Scotland*), 1866, as relates to *Scotland*, are hereby repealed, but such repeal shall not invalidate or affect anything already done in pursuance of these Acts or either of them; and all Public Libraries and Museums established in *Scotland* under these Acts or either of them shall be held as coming under the Operation of this Act.

Interpretation of Terms.

II. In the Construction of this Act the following Words and Expressions shall have the Meanings hereby assigned,

if not inconsistent with the Context or Subject Matter; that is to say,

The Expression "Burgh" shall mean a Royal Burgh or a Burgh or Town to which Magistrates and Councils were provided by the Act of the Third and Fourth Years of King *William* the Fourth, Chapter Seventy-seven:

The Word "District" shall mean a Burgh of Barony, a Burgh of Regality, or any other populous Place, not being a Royal Burgh or a Town or Burgh to which Magistrates and Councils were provided by the said Act of the Third and Fourth Years of King *William* the Fourth, Chapter Seventy-Seven, where any Local or General Police Act is in force:

The Word "Board" in Parishes shall mean the Parochial Board acting under the Powers and in execution of the Act of the Eighth and Ninth *Victoria*, Chapter Eighty-three, and in Districts it shall mean the Commissioners, Trustees, or other Body of Persons, by whatever Name distinguished, for the Time being in Office, and acting in execution of any Special, Local, or General Police Act:

The Word "Householders" in all Burghs shall mean all Persons entitled to vote in the Election of Members of Parliament; but in Districts it shall mean all Persons assessed under and for the Purpose of any Local or General Police Act which may be in force therein; and in Parishes it shall mean all Ratepayers under the Act of the Eighth and Ninth *Victoria*, Chapter Eighty-three:

The Expression "Police Rates" shall mean the Rates, Tolls, Rents, Income, and other Monies whatsoever which under the Provisions of any Police Act shall be applicable for the general Purposes of such Act.

Meeting to be called for considering the Adoption of this Act in any Burgh, District, or Parish.

III. Upon the Requisition in Writing of the Magistrates and Council or of Ten Householders in any Burgh, District, or Parish, the Chief or Senior Magistrate of such Burgh, or in the Case of a District or Parish the Sheriff of the County or One of his Substitutes, shall, within Ten Days after the Receipt of such Requisition, convene a Meeting of Householders, and preside at the same for the Purpose of considering whether this Act shall be adopted for such Burgh, District, or Parish, such Meeting to be held in any convenient Place on a Day not less than Twenty-one Days or more than Thirty Days after the Receipt of such Requisition; and Notice of the Time and Place of such Meeting shall be given by affixing the same upon the Doors of the

Parish Churches within such Burgh, District, or Parish, and also by Advertising the same in at least One Newspaper published or circulated within such Burgh, District, or Parish not less than Seven Days preceding the Day of Meeting.

Act may be adopted at Meeting by a Majority, and Chairman to cause a Minute to be made, and to sign it.

IV. If at such Meeting it shall be determined by a Majority of Householders present that the Provisions of this Act shall be adopted in such Burgh, District, or Parish, then the same shall from thenceforth come into operation therein; and the Chairman of the Meeting shall cause a Minute to be made of the Resolutions of the Meeting, and shall sign the same.

Expenses of carrying this Act into execution in Burghs and Districts to be paid out of the Police Rate.

V. The Expenses incurred in calling and holding such Meeting, whether this Act shall be adopted or not, and the Expenses of carrying this Act into execution when adopted, shall, in the Case of a Burgh or District, be paid out of the Police Rate, and the Magistrates and Council of such Burgh, or the Board of such District, shall yearly levy as Part of the Police Rate, or by a separate Rate, to be made, levied, and recovered by the Magistrates and Council of such Burgh or the Board of such District in such and the like Manner, from the same Descriptions of Persons and Property, and with and under the like Powers, Provisions, and Exceptions as the General Assessments leviable under the Acts of the Thirteenth and Fourteenth *Victoria*, Chapter Thirty-three (in the Case of Burghs or Districts which on or before the First Day of *August* One thousand eight hundred and sixty-two had adopted in whole or in part the Act of the Thirteenth and Fourteenth *Victoria*, Chapter Thirty-three), and of the Twenty-fifth and Twenty-sixth *Victoria*, Chapter One hundred and one (in the Case of all other Burghs or Districts), for Police and other Purposes, are authorized to be made, levied, and recovered, and as if such Magistrates and Council or the Board of such District were Commissioners elected under any of these Acts respectively, and the said Assessments were Part of the General Assessments authorized to be thereby made; and in the Case of a Parish the Board shall pay the Expenses aforesaid out of a Rate to be made, levied, and recovered in like Manner, and from the same Description of Persons and Property, and with and under the like Powers Provisions, and Exceptions, as the Poor Rate leviable under the Act of the Eighth and Ninth *Victoria*, Chapter Eighty-three: Provided always, that nothing herein contained shall prevent the City of *Glasgow* or any other Place from levying a Rate for the Purposes of this Act, in conformity with the Provisions of any Local Police Act which may for

the Time being be in force in said City of *Glasgow* or other Place.

Rate levied not to exceed the Sum of One Penny in the Pound of yearly Rent.

VI. The Amount of the Rate to be so levied for the Purposes of this Act in any Burgh, District, or Parish in any One Year shall not exceed the Sum of One Penny in the Pound of yearly Rent, and the Magistrates and Council of any Burgh, or the Board of any District or Parish, shall provide and keep Books in which shall be entered true and Regular Accounts of their Receipts, Payments, and Liabilities with reference to the Execution of this Act, to be called "The Public Libraries Account;" and such Books shall, without Fee or Reward, and at all reasonable Times, be open to the Inspection of every Person liable to be assessed by virtue of this Act, who respectively may, without paying for the same, take Copies of or make Extracts from such Books; and in case such Magistrates and Council of any Burgh, or Board of any District or Parish, or any of them respectively, or any of their respective Officers or Servants having the Custody of such Books, shall not permit the same to be inspected, or Copies of or Extracts from the Accounts to be made or taken, every Person so offending shall for every such Offence forfeit any Sum not exceeding Five Pounds, such Penalty to be recovered before the Sheriff or Justices of the Peace in like Manner as provided for the Recovery of Small Debts, and to be applied when recovered towards the Purposes of this Act.

The Accounts of the Magistrates and Council, or the Board of any District or Parish, to be open to Inspection.

Power to Council or Board to borrow on Mortgage or Bond.

VII. For carrying this Act into execution, the Magistrates and Council of any Burgh or the Board of any District or Parish respectively may from Time to Time borrow at Interest on the Security of a Mortgage or Bond of the Rates to be levied in pursuance of this Act such Sums of Money, to be repaid by yearly Instalments within a Period not exceeding Thirty Years, as may be by them respectively required; and the Commissioners for carrying into execution the Act of the Ninth and Tenth *Victoria*, Chapter Eighty, may, with the Consent of the Commissioners of Her Majesty's Treasury, from Time to Time advance and lend such Sums of Money.

Provisions of 8 and 9 Vict. c. 17, as to Borrowing Powers extended to this Act.

VIII. The Clauses and Provisions of "The Companies Clauses Consolidation (*Scotland*) Act, 1845," with respect to the borrowing of Money on Mortgage or Bond, and the Accountability of Officers, and the Recovery of Damages and Penalties, so far as such Provisions may respectively be applicable to the Purposes of this Act, shall be held as incorporated with this Act.

Boundaries of Burghs, &c.

IX. The Boundaries of Burghs and Districts shall be the same as the Boundaries declared for such Burghs and

Districts by and for the Purposes of the Acts of the Thirteenth and Fourteenth *Victoria*, Chapter Thirty-Three, and Twenty-fifth and Twenty-sixth *Victoria*, Chapter One hundred and one, or any Local Police Act which may for the Time being be in force in any such Burghs or Districts.

Lands, &c. may be appropriated, purchased, or rented for the Purposes of this Act.

X. The Magistrates and Council of any Burgh or the Board of any District or Parish, as the Case may be, may from Time to Time appropriate for the Purposes of this Act any Lands or Buildings vested in them, and also out of the Rates levied or Money borrowed as herein provided purchase, feu, or rent any Land or any suitable Building, and may upon any land so appropriated, rented, feued, or purchased erect any Buildings suitable for Public Libraries, Art Galleries, or Museums, or each respectively, and may alter or extend any Buildings for such Purposes, and repair and improve the same respectively, and fit up, furnish, and supply the same respectively with all requisite Furniture, Fittings, and Conveniences.

Certain Clauses of 8 and 9 Vict. c. 19 incorporated with this Act.

IX. All the Clauses and Provisions of the "Lands Clauses Consolidation Act (*Scotland*), 1845," with respect to the Purchase of Lands by Agreement, and with respect to the Purchase Money or Compensation coming to Parties having limited Interests, or prevented from treating, or not making a Title, and also with respect to Conveyances of Lands, so far as the same Clauses and Provisions respectively are applicable to the Cases contemplated by the last Section, shall be held as incorporated in this Act; and the Expression "the Special Act," used in the said Clauses and Provisions, shall be construed to mean this Act; and the Expression "the Promoters of the Undertaking," used in the same Clauses and Provisions, shall be construed to mean the Magistrates and Council of the Burgh or the Board of the District or Parish in question.

Lands, &c. may be sold or exchanged.

XII. The Magistrates and Council of any Burgh and the Board of any District or Parish may sell any Land, Buildings, or other Property vested in them for the Purposes of this Act, or exchange the same for any Land, Buildings, or other Property better adapted for the Purposes, and may also sell or exchange any Books, Works of Art, or other Property of which there may be Duplicates; and the Monies to arise from such Sale or Exchange shall be applied for the Purposes of this Act.

Property of Library, &c. vested in Magistrates, &c., Burghs and Boards of

XIII. The Lands and Buildings so to be appropriated, purchased, or rented, and all other Real or Personal Property whatever presented to or purchased for any Library, Art Gallery, or Museum established under this Act, shall, in the Case of a Burgh, be vested in the Magistrates and

Council, and in the Case of a District or Parish in the Board.

Districts or Parishes.

XIV. The Magistrates and Council of any Burgh or the Board of any District or Parish where this Act has been adopted shall, within One Month after its Adoption, and thereafter from Year to Year, in the Case of a Burgh at the First Meeting after the annual Election of Town Councillors, in the Case of a District at the First Meeting after the annual Election of Police Commissioners, and in the Case of a Parish at the First Meeting after the annual Meeting for the Election of representative Members of the Parochial Board, appoint a Committee, consisting of not more than Twenty Members, Half of whom shall be Magistrates and Members of the Council or Members of the Board respectively, and the remaining half shall be chosen by the Council or Board from amongst the Householders not Members of the Council or Board within such Burgh, District, or Parish, as the Case may be, Three to be a Quorum; and such Committee so appointed shall have Power, under the Authority of the Magistrates and Council or Board, as the Case may be, to purchase Books, Newspapers, Reviews, Magazines, and other Periodicals, Statuary, Pictures, Engravings, Maps, and Specimens of Art and Science, for the Establishment, Increase, and Use of such Libraries, Art Galleries, and Museums, and to do all things necessary for keeping the same in a proper State of Preservation and Repair; and such Committee, subject as aforesaid, shall manage, Regulate, and control such Libraries, Art Galleries, and Museums, and shall make Rules and Regulations for the Safety and Use of the same, and shall also have Power to appoint salaried Officers and Servants, to pay and dismiss them, and from Time to Time to provide the necessary Fuel, Lighting, and other Matters.

General Management to be vested in a Committee appointed by Magistrates and Councils of Burghs and Boards of Districts or Parishes.

XV. The Committee appointed as aforesaid shall, in the Case of a Burgh or District, meet once in every Three Months, or oftener if necessary, and in the Case of a Parish as often as may be necessary, to determine as to any Business connected with such Libraries, Art Galleries, or Museums; and in the Case of a Burgh the Provost, in the Case of a District the senior Magistrate, and in the Case of a Parish the Chairman of the Parochial Board, shall be Chairman of such Committee, and such Chairman shall, in the Case of an Equality of Votes, have a Casting Vote in addition to his Vote as an Individual; but in the Absence of such Chairman, the Meeting shall elect a Chairman who, for the Time being, shall exercise the Privileges of the Chairman appointed under this Act.

Meetings and Chairman of Committee.

If Meeting determine against Adoption of Act, no other Meeting to be called for Two Years.

XVI. If any Meeting called as aforesaid to determine as to the Adoption of this Act for any Burgh, District, or Parish shall determine against the Adoption, no Meeting for a similar Purpose shall be held for the Space of Two Years at least from the Time of holding the previous Meeting.

Art Galleries or Museums may be added to Public Libraries.

XVII. Wherever a Public Library has been established under any Act relating to Public Libraries or Museums, or shall hereafter be established under this Act, an Art Gallery or Museum, as the Case may be, may at any Time be established in connexion therewith, without any further Proceedings being taken under this Act.

Libraries, &c. to be free.

XVIII. All Libraries, Art Galleries, or Museums established under this Act shall be open to the Public free of all Charge.

Short Title.

XIX. In citing this Act for any Purpose whatever it shall be sufficient to use the Expression "The Public Libraries Act (*Scotland*), 1867."

CAP. XLII.

An Act to amend the Law relating to the Landlord's Right of Hypothec in Scotland, *in so far as respects Land held for Agricultural or Grazing Purposes.*—[15th July 1867.]

WHEREAS it is expedient to amend the Law relating to the Landlord's Right of Hypothec in *Scotland*, in so far as respects Land held for Grazing or Agricultural Purposes:

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Act to apply only to Scotland, and Short Title.

I. This Act shall apply only to *Scotland*, and may be cited for all Purposes by the Title of the "Hypothec Amendment (*Scotland*) Act, 1867."

Act to apply only to Land held for Farming Purposes;

II. This Act shall be construed as applying only to Farms or Land with the Buildings thereon occupied for Farming Purposes, and shall not apply to Dwelling Houses, Shops, and other Subjects, though the same may be in rural Districts, where the primary or chief Purpose of the Occupation shall be other than the raising of Agricultural Produce or the raising and rearing of Live Stock, saving

save as respects Register of Sequestrations.

and excepting always the Provision herein-after contained for the keeping of a Register of Sequestrations which shall be held as applicable to all Sequestrations for Rent whether of rural or urban Subjects.

Corn, &c., purchased bona fide, and delivered and removed, to be free from Hypothec.

III. Whensoever any Agricultural Produce shall have been *bonâ fide* purchased by any Person for its fair marketable Value from the Tenant or Lessee of any Farm or Lands, and shall have been actually delivered to the Purchaser, and removed from such Farm or Lands, and the Price thereof shall have been paid, or whensoever Agricultural Produce shall have been *bonâ fide* purchased at Public Auction from the Tenant or Lessee, or any Party holding his Authority so to sell, after Seven Days written Notice of the Intention of the Tenant or Lessee, or Party holding his Authority to sell by Public Auction, shall have been given to the Landlord or Lessor, or Person or Persons entitled to the Rent of such Farm or Land, or his or their Factor or known Agent, and Sequestration shall not have been obtained and registered in manner herein-after provided previous to or during the Currency of such Notice, then in either of these Cases all Right of Hypothec competent to the Landlord, Lessor, or Person or Persons entitled to the Rent of such Farm or Lands over such Agricultural Produce shall cease and determine: Provided always, that nothing herein contained shall apply to any Agricultural Produce which the Tenant is not entitled legally or by the Terms of his Lease to sell or carry off the Land, or which previous to the Completion of the Purchase thereof by the Removal of the same from the Farm or Lands, and by Payment of the Price, or after such Notice as that above referred to, has been sequestrated at the Instance of such Landlord, Lessor, or other Person, and the Sequestration whereof has been registered in the Register of Sequestrations for Rent, to be kept as herein-after provided, and is in force at the time of such Purchase.

Hypothec not to be available beyond Three Months after Rent is payable.

IV. In the event of the Landlord, Lessor, or Person entitled to the Rent of any Farm or Lands failing to commence Proceedings for making effectual by Sequestration his Right of Hypothec within Three Calendar Months after the conventional Term at which the Year's Rent or the last Portion due therof is made payable under the Terms of the Lease, Writing, or Bargain under which such Farm or Lands are possessed, or if no conventional Term for Payment of the Rent or any Portion thereof has been agreed upon then within Three Calendar Months after the legal Term at which such Year's Rent or the last Portion due thereof is payable, then all Right of Hypothec for the Rent or Portion thereof payable at such term, conventional or legal, shall cease and determine: Provided always, that the Provisions of this Section shall not apply to the Landlord's Right of Hypothec, or to his Right to use Sequestra-

tion for Rent Payable under any Lease, Writing, or Bargain current at the Date of the passing of this Act.

Stock of Third Party taken on a Farm to graze to be liable only to the Amount of Consideration payable for the grazing.

V. In the event of the Tenant or Lessee of any Farm or Lands having received and taken thereon to be grazed or fed any Sheep, Cattle, or other Live Stock belonging to any other Person, and having agreed with the Owner of the same for a *bonâ fide* Payment equal to the just Value of such grazing or feeding, such Sheep, Cattle or Stock shall be liable to the Hypothec of the Landlord, Lessor, or Person entitled to the Rent of the Farm or Lands to the Extent of the Amount of such Payment, and no further: Provided always, that so long as any Portion of such Sheep, Cattle, or other Live Stock shall remain on the Farm or Lands, the Hypothec over such Portion shall continue to the full Extent of the Payment originally agreed upon for the grazing or feeding of the whole of such Sheep, Cattle, or other Live Stock; and that in the event of the Removal of the Sheep, Cattle, or other Live Stock, or any Portion thereof, from the Farm or Lands, the Right of Hypothec shall, so long as the Payment or any Part thereof shall remain unpaid, continue to apply to such Sheep, Cattle, or other Live Stock to the Extent of the Amount of the Payment, or such Part thereof as shall be unpaid.

When Agricultural Produce or Stock is sequestrated, incompetent to sequestrate Furniture, Implements, imported Manures, &c.

VI. In the Sequestration for the Rent of any Farm or Lands, as defined by this Act, it shall not be competent to include any Household Furniture or Furnishings or any Agricultural Implements, nor shall it be competent, except as herein-after provided, to sequestrate for the Rent any imported Manure, Lime, Drain Tiles, Feeding Stuffs, or other Material, not being the Produce of or made upon the Farm or Lands, and not at the Time incorporated with the Soil or consumed or otherwise applied to the Purposes for which such Material may have been procured: Provided always, that where Manure of any Kind, or Lime, or Drain Tiles, Feeding Stuffs, or other Material have been brought upon the Farm or Lands for the Purpose of being used thereon in fulfilment of any specific Obligation imposed by the Lease, such Manure, Lime, Drain Tiles, Feeding Stuffs, or other Material may competently be included among the sequestrated Effects: Provided also, that nothing herein contained shall be held as affecting either the Right of using Sequestration or the Description of Articles which may be sequestrated, in so far as respects Premises and Occupations of Buildings or of Lands to which this Act does not apply.

Register of Sequestrations for

VII. At each Sheriff's or other Court where Sequestration for Rent is or may be granted a Register, entitled the "Register of Sequestrations for Rent" for the particular

Court, shall be kept by the Sheriff Clerk, Sheriff Clerk Depute, or other officer of Court having Custody of the Records thereof, in the Form set forth in the Schedule appended hereto, or as nearly in that Form as may be, and on the granting of any Sequestration for Rent there shall be forthwith entered in such Register the Name or Names of the Tenant or Lessee whose Agricultural Produce, Live Stock, or Effects are sequestrated, and the several Particulars detailed in the Schedule appended hereto; and every Person shall be entitled, on Payment of a Fee of One Shilling, to search the said Register during Office Hours of every Day on which the Office of the Sheriff Clerk, Sheriff Clerk Depute, or other Officer of Court having the Custody thereof shall be open; and all such Fees shall be duly accounted for and shall be paid by the Sheriff Clerk, Sheriff Clerk Depute, or other Officer receiving the same to the Credit of Her Majesty's Exchequer at such Times and in such Manner as the Commissioners of Her Majesty's Treasury shall from Time to Time direct.

Rent to be kept.

SCHEDULE referred to in the foregoing Act.

REGISTER of SEQUESTRATIONS for Rent for the County of _____

Name and Residence of Tenant or Lessee whose Produce, stock or Effects are sequestrated.	Date of Sequestration.	Name or Description of rural or urban Subjects.	Rent for which Sequestration granted.	Date when payable.	Landlord or Person taking out Sequestration.

CAP. LII.

An Act to alter and amend the Acts relating to the British *White Herring Fishery.*—[15th July 1867.

Recital of Acts relating to British White Herring Fishery.

WHEREAS the following Acts were passed for the Encouragement and Regulation of the *British* White Herring Fishery; that is to say, the Acts of Forty-eighth of *George* the Third, Chapter One hundred and ten; Fifty-first of *George* the Third, Chapter One hundred and one; Fifty-second of *George* the Third, Chapter One hundred and fifty-three; Fifty-fourth of *George* the Fourth, Chapter One hundred and two; Fifty-fifth of *George* the Third, Chapter Ninety-four; First of *George* the Fourth, Chapter One hundred and three; First and Second of *George* the Fourth, Chapter Seventy-nine; Fifth of *George* the Fourth, Chapter Sixty-four; Seventh of *George* the Fourth, Chapter Thirty-four; First of *William* the Fourth, Chapter Fifty-four; Fourteen and Fifteenth of *Victoria*, Chapter Twenty-six; Twenty-third and Twenty-fourth of *Victoria*, Chapter Ninety-two; Twenty-fourth and Twenty-fifth of *Victoria*, Chapter Seventy-two; Twenty-eighth and Twenty-ninth *Victoria*, Chapter Twenty-two:

And whereas it is expedient that certain of the Restrictions imposed by the recited Acts as to the description of Net, or Mode of fishing for and taking Herrings and Herring Fry on the Coasts of *Scotland* should be removed, and that the recited Acts should be amended in certain other respects:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

After passing of Act Restrictions on Mode of fishing for Herrings removed.

I. From and after the passing of this Act, notwithstanding anything in the recited Acts or any of them to the contrary, it shall be lawful to fish for and take Herrings and Herring Fry at all Places on the Coasts of *Scotland*, in any manner of way, and by means of any kind of Net having Meshes of a Size not less than that now permitted or required by Law, and to sell, buy, or have in possession Herrings or Herring Fry so fished for and taken; and in lieu of the larger Penalties imposed by the recited Acts or any of them upon Persons using Nets having Meshes of a Size less than that now permitted or required by Law, every Person who shall fish for Herrings or Herring Fry

with a Net having Meshes of a Size less than that now permitted or required by Law shall for every such Offence be liable in a Penalty of not less than Five Pounds and not exceeding Twenty Pounds, together with the Forfeiture of the Net.

Section 5. of 23 & 24 Vict. c. 92, repealed.

II. The Fifth Section of the Act passed in the Twenty-third and Twenty-fourth Years of Her present Majesty, Chapter Ninety-two, is hereby repealed, and in lieu thereof it is enacted as follows:

Commissioners may make Regulations for Preservation of Order.

It shall be lawful for the Commissioners of the *British* White Herring Fishery from Time to Time to make such Regulations as they shall think fit for the Preservation of Order among the Persons engaged in the Herring Fisheries on the Coasts of *Scotland*, and for preventing such Persons from destroying, injuring, or carrying off each other's Nets, or the Fish therein, or Floats, Buoys, or other Fishing Implements or Apparatus; and every Person who commits any Breach or Contravention of any such Regulations shall be liable to a Penalty of not less than Five and not exceeding Twenty Pounds for every such offence; and the Boat in or from which such Person shall commit such Breach or Contravention, and all sailing, rowing, or steering gear connected therewith, may be seized and detained by any Superintendent appointed under the Authority of the recited Acts or any of them, or by any Person acting under his Orders, or by any Officer of the Fishery or by any Person acting under his Orders, or by Order of any Sheriff, Justice of the Peace, or Magistrate having Jurisdiction under the recited Acts or any of them, or under this Act, for such Period, not exceeding Thirty Days, as the Commissioners shall determine. And the Herrings or Herring Fry in the Possession of the Person committing such Breach or Contravention, and the Nets, Floats, Buoys, and other Fishing Implements or Apparatus used by him, may be seized by any Superintendent appointed under the Authority of the recited Acts or any of them, or by any Person acting under his Orders, or by any Officer of the Fishery or by any Person acting under his Orders, or by Order of any Sheriff, Justice of the Peace, or Magistrate having Jurisdiction under the recited Acts or any of them, or under this Act, and may be forfeited.

Penalties for Contravention of Regulations.

Regulations may be rescinded or altered.

III. The Commissioners may from Time to Time rescind, alter, or amend any Regulation or Regulations made by them under the Authority of this Act.

Regulations to be

IV. All Regulations made by the Commissioners under the Authority of this Act, or Amendments or Alterations

thereof, shall, before taking effect, be submitted to and approved by the Commissioners of Her Majesty's Treasury, and shall thereafter be published by printed Copies thereof being posted up in conspicuous Positions near the Harbours or other Places frequented by Fishermen, in the Districts or Places to which the Regulations shall apply, and by printed Copies thereof being deposited with every Officer of the Fishery in such Districts or Places, and in the Office of the Sheriff Clerk or Sheriff Clerks of the County or Counties within which such Districts or Places are situated, and also by Advertisement inserted once in each of two Newspapers published or circulated in such Districts or Places, either setting forth such Regulations in full, or intimating that such Regulations have been made, and that Copies thereof have been deposited with the Officers of the Fishery as aforesaid, all in such Manner as the Commissioners shall direct; and after such Regulations shall have been so published it shall not be any Defence against Proceedings for the Enforcement of any Penalty or Forfeiture incurred by any Breach or Contravention thereof that the Person charged with such Breach or Contravention, was or alleged himself to be ignorant of such Regulations: Provided always, that such Regulations shall have been so published at least One Week before the same can be enforced; and a printed Copy of any Regulation, signed by the Secretary of the Commissioners for the time being shall be Evidence of the Terms of such Regulation, and that the same has been duly published, reserving to any Person having Interest the Right to prove that the same was not so published.

Regulations submitted to and approved by Treasury, and published.

V. Every Person who shall resist or obstruct any Person acting under the Orders of the Naval Superintendent appointed under the Authority of the recited Acts or any of them, in the Execution of the Powers or Duties conferred on or intrusted to him by or under any of the recited Acts or by or under this Act, shall be liable to a Penalty not exceeding Fifty Pounds, or, failing Payment thereof, to Imprisonment for any Period not exceeding Sixty Days.

Penalty for resisting Persons acting under Orders of Naval Superintendent.

VI. Every Person who resists or obstructs any Superintendent appointed under the Authority of the recited Act of the Twenty-third and Twenty-fourth Years of the Reign of Her present Majesty, Chapter Ninety-two, or any Person acting under his Orders, or any Officer of the Fishery or any Person acting under his Orders, in the Exercise of any of the Powers conferred on, or in the Execution of any of the Duties entrusted to, such Superintendent or Officer or the Persons acting under their Orders respectively, by or under any of the recited Acts, or by or under this Act,

Penalty for resisting Superintendents, Fishery Officers, &c.

shall be liable to a Penalty not exceeding Fifty Pounds, and, failing Payment thereof, to Imprisonment for any Period not exceeding Sixty Days.

Powers, &c. of 23 & 24 Vict. c. 92, and 24 & 25 Vict. c. 72, extended to this Act.

VII. All the Powers, Jurisdictions, and Authorities given, created, or conferred by the recited Acts of the Twenty-third and Twenty-fourth Years of the Reign of Her present Majesty, Chapter Ninety-two, and the Twenty-fourth and Twenty-fifth Years of the Reign of Her present Majesty, Chapter Seventy-two, or either of them, for carrying into effect the Purposes of those Acts respectively, shall, in so far as consistent with the Provisions hereof, be held to extend to and be incorporated with this Act; and all Forfeitures and Penalties imposed by or incurred under the Provisions of this Act may be prosecuted, declared, and enforced after the Forms and according to the Rules and Procedure prescribed by the said recited Act of the Twenty-third and Twenty-fourth Years of the Reign of Her present Majesty, Chapter Ninety-two: Provided always, that where any Herrings or Herring Fry shall have been seized as being liable to Forfeiture under the Provisions of the recited Acts or any of them, or of this Act, or of any Regulations made or to be made by the Commissioners as therein or herein provided, it shall be lawful for any Superintendent or any Officer of the Fishery, or any Person acting under their Orders respectively, to destroy such Herrings or Herring Fry, or to sell them as soon as may be by open Sale, as he shall think fit; and, if sold, the Proceeds, after deducting Expenses, shall, in the event of a Forfeiture being obtained, be accounted for to the Commissioners of Her Majesty's Treasury, or if the Sheriff, Justice, or Magistrate declaring the Forfeiture shall so direct, One Half thereof shall be paid to the Captor or Informer; or, in the event of no Forfeiture being obtained, the Proceeds, after deducting as aforesaid, shall be paid over, on Demand, to the Person in whose Possession the said Herrings or Herring Fry were when seized, unless such Person shall have absconded from Justice during the whole or any Part of the Period of Six Months from the Date of such Seizure; and all Penalties imposed and recovered under the Provisions of the recited Acts or any of them, or of this Act, shall be appropriated and disposed of in Terms of the Forty-eighth *George* the Third, Chapter One hundred and ten.

Nothing to affect Provisions of 6 & 7 Vict. c. 79, or of French Convention.

VIII. Nothing contained in this Act shall affect the Provisions of an Act passed in the Sixth and Seventh Years of the Reign of Her present Majesty, intituled *An Act to carry into effect a Convention between Her Majesty and the King of the* French *concerning the Fisheries in the Seas between the* British *Islands and* France, or the Pro-

visions of the Convention therein referred to, or the Provisions of any Act passed or to be passed for altering, amending, or repealing the said Act, or for carrying into effect a new Fishery Convention recently made between Her Majesty and the Emperor of the *French*.

Partial Repeal of recited Acts.

IX. The recited Acts, and all other Laws, Statutes, and Usages, shall be and the same are hereby repealed, in so far as necessary to give Effect to the Provisions of this Act, but in all other respects they shall remain in full Force and Effect.

Sect. 6, of 23 & 24 Vict. c. 92, repealed.

X. The Sixth Section of the "Herring Fisheries (*Scotland*) Act, 1860," shall be and the same is hereby repealed.

Interpretation of Terms.

XI. Unless there is anything in the Context repugnant to such Construction, the following Words in this Act shall have the Meanings hereby assigned to them:

The Words "the Commissioners" shall mean the Commissioners of the *British* White Herring Fishery:

The Word "Superintendent" shall mean and include the Naval Superintendent or any Superintendent appointed under the Authority of the recited Acts or any of them:

The Words "Officer of the Fishery" shall mean an Officer of the *British* White Herring Fishery appointed under the Authority of the recited Acts or any of them:

The Words "the Coasts of *Scotland*" shall mean and include all Bays, Estuaries, Arms of the Sea, and all Tidal Waters within the Distance of Three Miles from the Mainland or adjacent Islands.

Short Title.

XII. This Act may be cited for all Purposes as "The Herring Fisheries (*Scotland*) Act, 1867."

Commencement of Act.

XIII. This Act shall take effect from and after the passing thereof.

Only to apply to Scotland.

XIV. This Act shall only apply to *Scotland* and the Coasts thereof.

CAP. LV.

An Act to enlarge for the present Year the Time within which certain Certificates regarding Lunatics in Scotland *may be granted.*—[15th July 1867.]

WHEREAS by an Act of the Twenty-ninth and Thirtieth Years of Her present Majesty, Chapter Fifty-one, intituled

29 and 30 Vict. c. 51.

An Act to amend the Acts relating to Lunacy in Scotland, *and to make further Provision for the Care and Treatment of Lunatics*, it is enacted, Section Seven, that in no Case shall the Sheriff's Order for the Reception and Detention of any Lunatic in any Asylum or House remain in force longer than the First Day of *January* then first occurring after the Expiry of Three Years from the Date on which it was granted, or than the First Day of *January* in each succeeding Year, unless the Superintendent or Medical Attendant of the Asylum or House in which the Lunatic is detained shall, on each of the said First Days of *January*, or within Fourteen clear Days immediately preceding, grant, and transmit to the General Board of Lunacy in *Scotland*, a Certificate, on Soul and Conscience, according to the Form in Schedule (A.) annexed to the said Act, that the Detention of the Lunatic is necessary and proper, either for his own Welfare or the Safety of the Public:

And wheras, through Ignorance, or Misapprehension of the said Enactment, there has been an Omission on the Part of the Superintendents or Medical Attendants of a large Number of the Asylums or Houses in *Scotland* for the Reception and Detention of Lunatics, to grant and transmit the Certificates required by the before-recited Enactment:

And, for preventing any Inconvenience that might happen in consequence of such Omission, be it enacted by the Queen's Most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Certificates under Sect. 7 of 29 & 30 Vict. c. 51, granted on or before 1st October 1867, to have the same Effect as if granted on or before 1st January 1867.

I. Every Certificate granted and transmitted on or before the First Day of *October* of the present Year, but in other respects in accordance with the Provisions of the said Seventh Section of the recited Act and relative Schedule, shall have the same Effect in continuing in force the Sheriff's Order for the Reception and Detention of the Lunatic therein referred to as if the same had been granted and transmitted to the said General Board of Lunacy on the First Day of *January* of the present Year, and all Orders granted by Sheriffs for the Reception and Detention of any Lunatics in any Asylum or House shall continue in force till the said First Day of *October* in this present Year, notwithstanding the Omission to grant and transmit the Certificates aforesaid: Provided always, that, except in so far as hereby expressly provided, the said Seventh Section of the recited Act shall remain in full Force and Effect.

Indemnity to Persons

II. No Claim or Action of Damages shall lie at the Instance of or against any Person by reason of the Detention

during any Period anterior to the First Day of *October* next ensuing of any Lunatic in any Asylum or House in *Scotland* for the Reception and Detention of Lunatics, on the Ground of the Sheriff's Order having fallen or expired from the aforesaid Certificate not having been granted and transmitted in Terms of the Provisions of the recited Act.

who committed to grant Certificates on or before 1st January 1867.

CAP. LXXV.

An Act to remove certain Religious Disabilities affecting some of Her Majesty's Subjects, and to amend the Law relating to Oaths of Office.—[12th August 1867.]

WHEREAS certain of Her Majesty's Subjects are now, on the Ground of their Religious Belief, subject to Civil Disabilities, and are required to take Oaths for the Enjoyment of Offices and Franchises which other Subjects of Her Majesty are not required to take:

And whereas it is expedient to remove such Disabilities, and to substitute One uniform Oath for the several Oaths now required to be taken by different Classes of Her Majesty's Subjects as a Qualification for the Exercise and Enjoyment of Offices, Franchises, and Civil Rights:

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. [All the Queen's Subjects, without reference to their Religious Belief, shall be eligible to hold the Office of Lord Chancellor of Ireland.]

II. [When such Office shall be held by a Person not a Member of the Established Church, how Rights of Presentation to Benefices shall be exercised.]

III. [When the Chancellorship shall be held by a Person not a Member of the Established Church, the Jurisdiction of nominating Delegates to hear Appeals from Ecclesiastical Courts shall be exercised by such other of the Judges as the Crown shall appoint, &c.]

IV. Every Person holding any Judicial or Civil or Corporate Office may attend and be present at any Place of public Meeting for Religious Worship in *England, Ireland,* or *Scotland* in the Robe, Gown, or other peculiar Habit of his Office, or with the Ensign or Insignia of or belonging to the same, without incurring any Forfeiture of Office or Penalty for such Attendance.

Every Judicial or Corporate Officer may attend his Place of Worship in his Robes.

V. In all Cases in which any Oath which has been sub-

The Oath

herein named shall be substituted in all Cases for the Oaths now required to be taken by Officeholders and others in lieu of the Oaths of Allegiance, Supremacy, and Abjuration.

stituted for the Oaths of Allegiance, Supremacy, and Abjuration is now required to be taken, or taken and subscribed, as a Qualification for the Exercise or Enjoyment of any Office, Franchise, or Civil Right, the following Oath shall be taken, or taken and subscribed, as the Case may be, in lieu and instead of such substituted Oath:

"I *A.B.* do swear, That I will be faithful and bear true "Allegiance to Her Majesty Queen Victoria; and I do "faithfully promise to maintain and support the Succession "to the Crown, as the same stands limited and settled by "virtue of the Act passed in the Reign of King William "the Third, intituled 'An Act for the further Limitation "of the Crown, and better securing the Rights and Liber-"ties of the Subject,' and of the subsequent Acts of Union "with Scotland and Ireland. So help me God."

The Name of the Sovereign for the Time being shall be used in the Oath.

VI. Where in the Oath hereby appointed the Name of Her present Majesty is expressed, the Name of the Sovereign of this Kingdom for the Time being, by virtue of the Act "for the further Limitation of the Crown, and better securing the Rights and Liberties of the Subject," shall be substituted from Time to Time, with proper words of Reference thereto.

Provision in favour of Quakers, &c.

VII. Every Person of the Persuasion of the People called Quakers, and every other Person for the Time being by Law permitted to make a solemn Affirmation or Declaration instead of taking an Oath, may, instead of taking and subscribing the Oath hereby appointed, make and subscribe a solemn Affirmation in the Form of the Oath hereby appointed, substituting the Words "solemnly, sincerely, and truly declare and affirm," for the Word "swear," and omitting the Words "So help me God;" and the making and subscribing such Affirmation with such Substitution as aforesaid by a Person hereby authorized to make and subsbrice the same shall have the same Effect as the making and subscribing by other Persons of the Oath hereby appointed.

Short Title.

VIII. This Act may be cited for all Purposes as "The Office and Oath Act, 1867."

CAP. LXXX.

An Act to define the Duties of the Assessor of Railways in Scotland *in making up the Valuation Roll of Railways, and to amend in certain respects the Valuation of Lands* (Scotland) *Acts.* [12*th* August 1867.]

WHEREAS an Act was passed in the Seventeenth and

Eighteenth Years of Her Majesty's Reign, Chapter Ninety-one, intituled *An Act for the Valuation of Lands and Heritages in* Scotland, and another Act was passed in the Twentieth and Twenty-first Years of Her Majesty's Reign, Chapter Fifty-eight, intituled *An Act to amend the Act Seventeenth and Eighteenth* Victoria, *for the Valuation of Lands in* Scotland: 17 and 18 Vict. c. 91. 20 & 21 Vict. c. 58.

And whereas it is expedient to farther define the Duties of the Assessor of Railways in *Scotland* in making up the Valuation Rolls of Railways under the first-recited Act, and to amend in certain other respects the Provisions of both the recited Acts:

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Short Title.

I. This Act shall be cited for all Purposes as "The Valuation of Lands (*Scotland*) Amendment Act, 1867."

Definition of Term.

II. The term "permanent Way" in this Act shall mean and include the Line or Lines of Railway, Bridges under and over the same, Viaducts, Tunnels, Fences, and Ditches along the said Lines, Signals and Apparatus connected therewith.

One Half of Expense of maintaining permanent Way of Railways to be deducted by Assessor of Railways and Canals before fixing cumulo Value of Railway.

III. In ascertaining the yearly Rent or Value in Terms of the first-recited Act of the Lands and Heritages in any Parish, County, or Burgh belonging to or leased by any Railway Company, and forming Part of the Undertaking of such Company, One Half of the Expenses incurred in maintaining or repairing the permanent Way of Railways, and charged to Revenue in the published Accounts of such Railway Company for the Year preceding that for which the Valuation is made, shall be allowed by the Assessor of Railways and Canals as a Deduction before the cumulo yearly Rent or Value of each Railway is fixed, provided that such Assessor is satisfied that such Expenses have been truly expended in maintaining or repairing the permanent Way of each such Railway: Provided always, that the Cost of Repairs of Stations, Engine Houses, Workshops, Wharfs, Docks, Depôts, Counting Houses, and other Houses and Places of Business belonging to or leased by any Railway Company, and forming Part of the Undertaking of such Company, shall not be deemed to be Expenses to be allowed by the said Assessor in Terms of this Section.

Amendment of Sec. 22 of 17 & 18 Vict. c. 91, as to Stations, &c.

IV. Whereas the Twenty-second Section of the first-recited Act, in providing the Mode of ascertaining the yearly Value or Rent of the Lands and Heritages in any Parish, County, or Burgh belonging to or leased by any Railway or Canal Company, and forming Part of the

Undertaking of such Company, fixed the Deduction to be made from the cumulo yearly Value or Rent of the whole Lands and Heritages in *Scotland* as aforesaid of each such Railway or Canal Company in respect of the Cost of the Stations, Wharfs, Docks, Depôts, Counting Houses, and other Houses and Places of Business in *Scotland*, of and connected with the Undertaking of such Company, at a Sum equal to Three Pounds *per centum* of the whole Cost thereof: And whereas such Deduction was fixed at too small a Sum, and should for the future be increased: Be it enacted as follows:

The Twenty-second Section of the first-recited Act shall be read and construed as if the Words "Five Pounds *per Centum*" were substituted for the Words 'Three Pounds *per Centum*" wherever these latter Words occur in the said Section of the said first-recited Act.

Separate Valuation to be assigned, if required before 1st April in each Year, to Towns and populous Places in which a General or Local Police Act is in force.

V. The Assessor of Railways and Canals shall, if required as herein-after provided, specify and assign separately the Value of those portions of Railways included within the Limits of Burghs, Towns, or populous Places (not being Burghs in the Sense of the Twenty-seventh Section of the first-recited Act, which Section shall remain in full Force and Effect) which have adopted or shall hereafter adopt the Provisions of the Acts of the Thirteenth and Fourteenth *Victoria*, Chapter Thirty-three, or of the Twenty-fifth and Twenty-sixth *Victoria*, Chapter One hundred and one, or in which any Local Police Act is or may hereafter be in force: Provided always, that it shall not be necessary for the said Assessor to assign separately the Value of the Portions of Railways included within the Limits of any Burgh, Town, or populous Place, in Terms of this Section, unless on or before the First Day of *April* in each Year the Town Clerk or Clerk of the Commissioners or Trustees of Police thereof, as the Case may be, shall have required him so to assign the same; and such Town Clerk or Clerk of the Commissioners or Trustees of Police, when making such Requisition, shall be bound to state the lineal Measurement of the Portions of the Railway or Railways belonging to or leased by any Railway Company, and forming Part of the Undertaking thereof, situated within the Limits of such Burgh, Town, or populous Place, and the Assessor shall satisfy himself as to the Correctness of such Measurement; and the said Assessor, immediately on the Completion of the Valuation Roll made up by him under the recited Acts and this Act, shall transmit to each Town Clerk or Clerk of the Commissioners or Trustees of Police so requiring him as aforesaid a certified Copy of the Valuation, taken from such Valuation Roll, of

the Lands and Heritages within such Burgh, Town, or populous Place, as the Case may be, belonging to or leased by and forming Part of the Undertaking of such Company; and such Valuation relating to such Company shall be engrossed by such Town Clerk or Clerk of the Commissioners or Trustees of Police, as the Case may be, in the Roll or Book of Assessment of such Burgh, Town, or populous Place made up in Terms of the Acts of the Thirteenth and Fourteenth *Victoria*, Chapter Thirty-three, or of the Twenty-fifth and Twenty-sixth *Victoria*, Chapter One hundred and one, or of the Local Act in force in such Burgh, Town, or populous Place; and such Valuation shall be authenticated by the Signature of such Town Clerk or Clerk of the Commissioners or Trustees of Police, as the Case may be, and shall be thenceforward deemed and taken to be a Part of such Roll or Book of Assessment of such Burgh, Town, or populous Place, as the Case may be.

Valuation Roll of Railways made up by Assessor of Railways and Canals to be open for Inspection, &c.

VI. The Valuation Roll to be made up by the Assessor of Railways and Canals, while in the Hands of such Assessor, shall be patent and accessible to all Persons having Interest therein, and the Assessor shall, when required by any such Person, exhibit to him a Statement showing the Principles and Calculations on which the Valuation of such Assessor is founded, without Payment of any Fee; and pending the Consideration of any Appeal against the Valuation of such Assessor, he shall, if required, be bound to lodge the said Statement in Court Six Days before such Appeal is to be heard.

Time for lodging Appeals against Assessor's Entries in Valuation Roll.

VII. All Appeals or Complaints against any Entry in the Valuation Rolls made up in Terms of the said recited Acts and of this Act, either by the Assessors appointed by the Commissioners of Supply of any County, or by the Magistrates of any Burgh, or by the Assessor of Railways and Canals, shall, except as after provided, be lodged not later than the Tenth Day of *September* in each Year, and every such Appeal or Complaint shall, except as aforesaid, be heard and determined not later than the Thirtieth Day of *September* in each Year.

Sec. 2 of 20 & 21 Vict. c. 58 amended as herein stated.

VIII. The Second Section of the second-recited Act is hereby amended to the Effect of providing that hereafter the Judges to whom the Case therein referred to shall be submitted, instead of being the Senior Lord Ordinary and the Lord Ordinary officiating in Exchequer Causes in the Court of Session, shall be any Two Judges in the said Court, who shall be named for that Purpose from Time to Time by Act of Sederunt of the said Court: Provided always, that any Valuation which shall have been confirmed or altered in conformity with the Opinion of said

Judges shall thereafter be final and not subject to Review in any manner of way.

Liability to Assessment not to be altered by this Act.

IX. Nothing contained in this Act shall alter or affect any Classification or Power of Classification, or any Deduction or Allowances, or Power of making Deductions or Allowances from gross Rental or annual Value, made or possessed by any Body, Persons or Person, entitled to impose or levy Assessments, except that in estimating the Amount of such Deductions or Allowances there shall not be allowed or included therein the Proportion of the Expenses of maintaining or repairing the permanent Way of Railways to be allowed by the Assessor of Railways and Canals in Terms of Section Third of this Act; and nothing contained in this Section shall affect the Value to be inserted in the Valuation Roll of Railways and Canals in Terms of this Act; and nothing contained in this Act shall exempt from or render liable to Assessment any Person or Property not previously exempt from or liable to Assessment.

Printing of Valuation Roll.

X. It shall be lawful for the Commissioners of Supply of any County, or the Magistrates of any Burgh to resolve at any Meeting of their Number, ordinary or special, duly called, and by a Majority of those attending and voting, that the Valuation Roll of such County or Burgh for the current Year shall be printed; and the Expenses of such Printing shall be deemed to be Part of the Expenses of making up such Roll in Terms of the Eighteenth Section of the first-recited Act, and shall be assessed for and levied accordingly: Provided always, that Notice of the Intention to move such Resolution shall be inserted in the Notice calling the Meeting at which it is to be moved.

Partial Repeal of recited Acts.

XI. The recited Acts, and all other Laws, Statutes, and Usages, shall be and the same are hereby repealed, in so far as necessary to give Effect to the Provisions of this Act, but in all other respects they shall remain in full Force and Effect.

Commencement of Act.

XII. The First Valuation Rolls made up under the said recited Acts and this Act shall be for the Year from *Whit Sunday* One thousand eight hundred and sixty-seven to *Whit Sunday* One thousand eight hundred and sixty-eight: Provided always, that for such Year only the Time allowed to the Assessor of Railways and Canals for making up his Valuation Roll, and transmitting Copies thereof to each Railway, Canal, and other Company, shall be and is hereby extended to the Fifteenth Day of *September* next; the Time for complaining to the said Assessor, or lodging a Note of Appeal to the Lord Ordinary officiating on the Bills, or to the Sheriff, as the Case may be, against any

Valuation made by such Assessor, shall be and is hereby extended to the Tenth Day of *October* next; and the Time for hearing and determining any such Complaint or Appeal shall be and is hereby extended to the Thirtieth Day of *November* next.

CAP. LXXXII.

An Act to alter certain Duties, and to amend the Laws relating to the Customs. [12th August 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Reduction of Restriction of Size of Ships importing Spirits.

I. For the Words "Fifty Tons" in the Forty-fourth Section of "The Customs Consolidation Act, 1853," relating to the Importation of Spirits, the Words "Forty Tons" shall be substituted, and also for the Words "Fifty Tons" in the Nineteenth Section of the Act Twentieth and Twenty-first *Victoria*, Chapter Sixty-two, the Words "Forty Tons" shall be substituted; and the said Sections shall be read and construed as if the Words "Forty Tons" so substituted had in each case been originally inserted therein and enacted thereby, instead of "Fifty Tons."

Spirits may be imported in Cases containing not less than Two Gallons, in Bottles of any Size.

II. Spirits may be imported in Bottles of a larger Size or Content than Three Pints, provided all such Bottles be properly packed in Cases, each of which Cases shall not contain a less Quantity than Two Gallons of Spirits, and *bonâ fide* form Part of the Cargo of the importing Ship, and be reported.

Extending Sect. 75 of 16 & 17 Vict. c. 107, as to Expense of boarding Ships.

III. The Seventy-fifth Section of "The Customs Consolidation Act, 1853," shall extend to and include all Vessels coming or brought into any Port in the United Kingdom, and in respect of which any Officer of Customs may be stationed in charge, either on board thereof or otherwise, for the due Protection of the Revenue.

2 & 3 Vict. c. 71, s. 44, not to apply to Customs Offences.

IV. The Forty-fourth Section of the Act Second and Third of *Victoria*, Chapter Seventy-one, shall not be deemed to apply to any Offence against this or any other Act relating to the Customs.

Operation of Sect. 2 of 23 & 24 Vict. c. 110, limited.

V. The Words "United Kingdom" in the Second Section of "The Customs Duties Consolidation Act, 1860," are hereby declared to apply to and include only *Great Britain* and *Ireland*.

To substi-

VI. All *British* Goods brought back into the United King-

tute simpler Provisions as to Goods per Bill of Store.

dom, being of such a Kind or Description as, if Foreign, would be liable to any Duty of Customs on Importation, shall be deemed to be Foreign, and liable to the same Duties, Rules, Regulations, and Restrictions as Foreign Goods of the like Kind or Description; but if the same shall be brought back within Five Years from the Time of the Exportation thereof, and it shall be proved to the Satisfaction of the Commissioners of Customs that they are *British* Goods returned, the same may be entered by Bill of Store, containing such Particulars and in such Manner and Form as the said Commissioners shall direct: Provided always, that all Corn, Grain, Meal, and Flour brought into the United Kingdom shall be deemed and taken to be Foreign Goods; and all Goods brought into the United Kingdom for which any Drawback of Excise or Customs shall have been received on Exportation shall be deemed and treated as Foreign, unless admitted to Entry by special Permission of the Commissioners of Customs, and on Repayment of such Drawback; and all Foreign Goods on Re-importation into the United Kingdom, whether they shall have paid Duty on their First Importation or not, shall be liable to the same Duties, Rules, Regulations, and Restrictions as if then imported for the First Time: Provided also, that if any *British* Goods brought into the United Kingdom bear the Brand or Mark of any *British* Manufacturer, the same shall be admitted to Entry as such, without a Bill of Store, if the Proprietor of such Brand or mark, or his legal representative, shall give his Consent in Writing to the Delivery thereof.

Warehoused Goods removed to be produced to Officers of Customs before Entry.

VII. When any Warehoused Goods are removed under Bond from a Customs Warehouse at one port to be warehoused at another Port, or for Exportation therefrom, such Goods shall, within Forty-eight Hours after Arrival at such Port, and on or before the Entry thereof for Re-warehousing, Exportation, or otherwise, be produced to the proper Officers of Customs at such last-mentioned Port, although the Time prescribed in such Bond for the Removal, Re-warehousing, or Exportation of such Goods shall not have expired, and if not so produced the Bond under which the same are removed shall be forfeited, and may be put in Suit, in the same Manner as if the Regulation hereby made formed Part of the Condition of such Bond.

To adjust Duties on Sulphuric Ether, Collodion, and purified Naphtha.

VIII. Upon the Importation into *Great Britain* or *Ireland* of the following Goods, and in lieu of any Duties now chargeable thereon, the following Duties shall be charged; namely, upon every Gallon of Sulphuric Ether Twenty-five Shillings, and upon every Gallon of Collodion Twenty-

four Shillings, and upon Naphtha or Methylic Alcohol purified by means of Filtration or other Process Ten Shillings and Fivepence for every Gallon of the Strength of Proof ascertained by *Sykes'* Hydrometer, and so in proportion for any greater or less Strength than the Strength of Proof, and for any greater or less Quantity than a Gallon.

Definition of Term "any Spirits" in Sect. 9 of 28 & 29 Vict. c. 98.

IX. It is hereby declared, That the Words "any Spirits" in the Ninth Section of the Act of the Twenty-eighth and Twenty-ninth of *Victoria*, Chapter Ninety-eight, shall not authorise the Use of flavoured or compounded *British* Spirits in the fortifying of Wine in a Customs Warehouse.

Shipping Bill and Duplicate for Goods in Transit.

X. Whenever any Goods are reported in Transit, and entered or required to be entered as Goods in Transit, the Person entering the same shall furnish to the proper Officer of the Customs a Shipping Bill, containing an accurate Account of the Quantity and Description of the Goods, and of the Value of such of them as were formerly chargeable with Duty at Value on Importation, together with a Duplicate of such Shipping Bill, and shall comply with the Rules and Regulations for the Time being of the Commissioners of Customs respecting the Shipment and Clearance of such Goods; and in case such Goods are found not to correspond with the Particulars contained in such Shipping Bill, the same may be detained until the Discrepancy is explained to the Satisfaction of the Commissioners of Customs, who may thereupon restore the same, on such Terms as they may deem proper; and any Person entering Goods in Transit who shall refuse or neglect to furnish such Shipping Bill and Duplicate, or either of them, to such Officer, shall forfeit a Penalty of Forty Shillings.

Drawback Goods not agreeing with Shipping Bill forfeited.

XI. If any Goods upon which any Drawback shall be claimed or allowed shall be brought to any Quay, Wharf, or other Place to be shipped for Exportation, or shall be actually shipped, and shall, on Examination by the proper Officers of Customs, be found not to agree in Quantity, Quality, and Description with the Entry in the Shipping Bill, Debenture, or other proper Document or Authority for Allowance of Drawback on Shipment, or shall be found to be of less Value for Home Use than the Amount of the Drawback claimed, all such Goods, and the Package containing the same, with all other the Contents therein, shall be forfeited; and the Person or Persons entering such Goods, and claiming the Drawback thereon, or claiming more Drawback on any Goods than the Value thereof, or than shall be legally due thereon, shall in any and every such Case forfeit and pay a Sum of One hundred Pounds, or treble the Value of such Goods so entered, or of the

Persons claiming Drawback thereon, or more than due, to forfeit Treble Value, or L.100.

Amount of the Drawback claimed, at the Election of the Commissioners of Customs.

Goods on board to correspond with Content.

XII. If any Goods liable to Duty on Importation, or taken from the Warehouse to be exported, or entitled to Drawback on Exportation, or exported under Bond, which are enumerated in the Content of any Ship, shall not be duly shipped before the Departure of such Ship, or shall not be duly certified by the proper Officer as short shipped, such Goods shall be forfeited; or if any such Goods shall be taken on board such ship, not being enumerated in such Content, the Master of such Ship shall forfeit the Sum of Five Pounds in respect of every Package of such Goods; and if any Goods duly shipped on board such Ship shall be unshipped, or landed at any other place than that for which they shall have been cleared, unless otherwise accounted for to the Satisfaction of the Commissioners of Customs, the Master of such Ship shall forfeit a Sum equal to treble the Value of the Goods so landed.

Provisions of Acts relating to exportation of Goods applicable to Goods in Transit.

XIII. The Provisions contained in the several Acts relating to the Customs with reference to the Exportation of warehoused Goods shall be deemed to apply to and include Goods liable to Duties of Customs transhipped, and Goods exported on Drawback.

To prevent Goods lying at Risk on the Quays or Lighters for an unreasonable Time.

XIV. If any Goods in respect of which Bond shall be given for the Exportation thereof in any Ship shall not be duly exported in such Ship, or be re-warehoused, within Fourteen Days after the final Clearance of such Ship, the Person or Persons entering the same shall be liable to a Penalty of Five Pounds, unless they shall in the meantime have been entered for Exportation under Bond in some other Ship, in which Case the Person or Persons entering the same shall be liable to a Penalty of Five Pounds, unless the same shall be exported in or re-warehoused within Fourteen Days after the final Clearance of such last-mentioned Ship.

British and Irish Spirits may be exported in Casks of Nine Gallons each.

XV. *British* or *Irish* Spirits may be exported from *Great Britain* or *Ireland* to Parts beyond the Seas, or be removed to the *Isle of Man*, in Casks of the Content of Nine Gallons each at the least; but no *British* or *Irish* Spirits shall be removed or exported from the *Isle of Man* to any other Part of the United Kingdom, under pain of Forfeiture thereof.

Spirits sweetened, coloured, &c., may be removed from one Customs Warehouse

XVI. Spirits to which any sweetening or colouring matter or any other Ingredient may have been added in a Customs Warehouse, under the Provisions of the Seventh Section of an Act passed in the Twenty-eighth and Twenty-ninth Years of Her Majesty's Reign, Chapter Ninety-eight, may, notwithstanding anything to the contrary contained in

to another in Bottles.

the said last-mentioned Act, be removed for Exportation or Shipment as Stores, under such Regulations as the Commissioners of Customs shall appoint, to any other approved Customs Warehouse in the same or at any other Port, provided such Spirits be drawn off into Imperial or reputed Quart or Pint Bottles, and be packed in Cases containing not less than One Dozen Quarts or Two Dozen Pints.

Wine may be fortified to more than 40 per Cent. for Exportation.

XVII. Wine for Exportation may be fortified in Bond, by permission of the Commissioners of Customs, to a greater Degree of Strength than Forty *per Cent.* of Proof Spirit, if it appear to them to be necessary for the Preservation of such Wine during the Voyage.

Penalty on Officers of Customs not delivering up Commissions or Deputations on Retirement, &c.

XVIII. Whenever any Officer or other Person in the Service or Employment of the Customs, and having a Commission or Deputation from the Commissioners of that Revenue, shall cease to be employed in such Service, and shall for the Space of One Week after he shall cease to be in such Service or Employment neglect or refuse to deliver up such Commission or Deputation, every such Person shall be liable to be proceeded against for such Offence before any Justice of the Peace, who is hereby authorised, upon Conviction of such Offender, to sentence him to imprisonment in any Gaol until the Offender shall deliver up such Commission or Deputation, or otherwise account for the same to the Satisfaction of the Commissioners of Customs.

Certain Monies, &c. deemed within Meaning of 2W. 4 c. 4.

XIX. Any Monies, Chattels, or other valuable Securities which shall or may be received by any Officer or Clerk in the Service of the Customs, either as Duties of Customs, or under or by virtue of any Statute, or by the Order or Direction of the Commissioners of Customs, or in virtue of his Office or Employment, or otherwise, for the Use and Service of Her Majesty or of any Public Department, shall be deemed to be Monies, Chattels, or valuable Securities for the Public Service within the Meaning of the Act of the Second of *William* the Fourth, Chapter Four.

"Boat" in Sect. 207 of 16 & 17 Vict. c. 107, to apply to Boats under 100 Tons.

XX. The Word "Boat" in the Two hundred and seventh Section of "The Customs Consolidation Act, 1853," shall be deemed to mean, apply to, and include any Vessel or Boat, whether decked, partially decked, or open, not being of the Burden of One hundred Tons, and not belonging to any Ship.

Police authorised to co-operate with Officers of Customs, &c.

XXI. The Powers of Seizure and Detention conferred by the Two hundred and twenty-third Section of "The Customs Consolidation Act, 1853," upon Officers of Customs or Excise, and others, shall extend to and be conferred upon the Constables and Police Officers of any County, City, or Borough in the United Kingdom, with the Sanction of the Magistrates having Jurisdiction therein.

Persons in Prison against whom Informations are exhibited for Offences against the Customs Laws to be brought up by Habeas Corpus at the Hearing of such Informations.

XXII. Where any Person against whom an Information shall be exhibited before a Justice of the Peace for any Offence committed by such Person against any Act relating to the Customs shall be in Prison on any Account whatever at the Time appointed for the Hearing of such Information, the Commissioners of Customs shall cause to be obtained and issued out of the Court of Exchequer in *England*, *Scotland*, or *Ireland*, as the Case may require, a Writ of Habeas Corpus directed to the Governor or Keeper of the Prison in which such Person shall be confined, commanding him to convey such Person to the Place of Hearing to be specified in such Writ, in order that the said Person may answer the said Information and attend the Trial thereof; and such Writ of Habeas Corpus shall be issued out of either of the said Courts, on Application made by the Solicitor for the Customs, on behalf of the said Commissioners, to any Baron or Judge of any of the Superior Courts of Law in *England*, *Scotland*, and *Ireland* respectively; and it shall be lawful for the Justices or Magistrate before whom any such Information shall be brought for Adjudication to refuse to proceed with the said Information in the Absence of the Person charged, when satisfactory Proof shall be made that such Person is confined in Prison.

Officers may search Premises by Warrant granted on reasonable Cause shown.

XXIII. If any Officer of Customs shall have reasonable Cause to suspect that any uncustomed or prohibited Goods are harboured, kept, or concealed in any House or other Place either in the United Kingdom or the Channel Islands, and it shall be made to appear by Information on Oath before any Justice of the Peace in the United Kingdom, or any Deemster, Jurat, Bailiff, or other Magistrate in the Channel Islands, it shall be lawful for such Justice, Deemster, Jurat, Bailiff, or other Magistrate, by special Warrant under his Hand, to authorize such Officer to enter and search such House or other Place, and to seize and carry away any such uncustomed or prohibited Goods as may be found therein; and it shall be lawful for such Officer, and he is hereby authorized, in case of Resistance, to break open any Door, and to force and remove any other Impediment or Obstruction to such Entry, Search, or Seizure as aforesaid; and such Officer may, if he see fit, avail himself of the Service of any Constable or Police Officer to aid and assist in the Execution of such Warrant, and any Constable or other Police Officer is hereby required when so called upon to aid and assist accordingly.

To impose distinctive Mark on Foreign

XXIV. All Gold and Silver Plate which shall be imported from Foreign Parts, and which shall be sent to any Assay Office in the United Kingdom at which Gold and

Silver Plate is now or shall at any Time hereafter be by Law required to be assayed, and which when so sent shall be then assayed, tested, stamped, and marked, shall, in addition to the Marks for the Time being used at such Assay Office for the Purpose of marking *British* Plate, be marked with the further mark of the letter F on an oval Escutcheon, in order to denote that such Gold or Silver Plate was imported from Foreign Parts, and was not wrought or made in *England, Scotland,* or *Ireland;* and the Wardens and Officers in such and every such Assay Office, and the Persons employed by them, shall have Power to impress and mark, and shall impress and mark, such further and additional Mark, before such Plate shall be delivered out from such Assay Office. Plate assayed.

XXV. The Commissioners of Customs may from Time to Time establish Regulations as to the Quantities, Custody, and Disposal of Tobacco, Spirits, and Tea to be used as Stores by the Master, Crew, and Passengers of any Vessel about to depart from the Channel Islands to any Port in the United Kingdom, or to any Fishing Grounds at Sea, having regard to the Time that will be occupied in the contemplated voyage, the Tonnage of the Vessel, and the Number of her Crew and Passengers, the Particulars of such Stores to be noted on the Clearance of the Vessel; and if they or any Part thereof be landed in the United Kingdom from the said Vessel contrary to the Regulations so established, or without the Knowledge or Permission of the proper Officer of the Customs, they shall be forfeited, and the Master of such Vessel shall, on Proof of any such Landing or Unshipment forfeit the Penalty of Twenty Pounds. Stores for Vessels departing from the Channel Islands.

XXVI. Any Goods the Growth of the *Isle of Man,* or there manufactured from Materials the Growth of the said Isle, or from Materials not subject to Duties in *Great Britain* or *Ireland,* or from Materials upon which the Duty has been paid in *Great Britain* or *Ireland,* and upon which no Drawback has been subsequently granted, may be brought from the said Isle into *Great Britain* or *Ireland* without Payment of any Duty: Provided always, that any Goods may nevertheless be charged with such Proportion of such Duties as shall fairly countervail any Duties of Excise payable on the like Sort of Goods the Produce of that Part of *Great Britain* or *Ireland* into which they shall be brought or payable upon any of the Materials from which such Goods are manufactured; and any Articles either wholly or in part manufactured in the said Isle from any Materials upon which a higher Duty is payable upon their Importation into *Great Britain* or *Ireland* Goods the Growth or Manufacture of Isle of Man may be imported into Great Britain or Ireland on Certificate, &c. 18 & 19 Vict. c. 96.

than on their Importation into the *Isle of Man* may be brought from the said Isle into *Great Britain* or *Ireland* on Payment of the Duty payable on such Goods in that Part of *Great Britain* or *Ireland* into which they shall be so brought.

Parts of Acts set forth in Schedule repealed.

XXVII. The several Parts of Acts set forth in the Schedule to this Act annexed are hereby repealed to the Extent to which the same are by such Schedule expressed to be repealed.

Registry in Channel Islands.

XXVIII. This Act shall be registered in the Royal Courts of the Islands of *Guernsey* and *Jersey* respectively, and the said Royal Courts respectively shall have full Power and Authority and are hereby required to register the same.

Commencement of Act.

Short Title.

XXIX. This Act shall come into operation on the Day of the passing thereof; and in citing it in other Acts of Parliament and in legal Instruments it shall be sufficient to use the Expression "The Customs Amendment Act, 1867."

SCHEDULE of Parts of Acts to be repealed.

Date of Act.	Title of Act.	Extent of Repeal.
16 & 17 Vict. c. 107.	"The Customs Consolidation Act, 1853."	So much of the Table of Prohibitions and Restriction Inwards of Section 44, as relates to Parts of Articles as therein described, and so much of the said Table as relates to Silk and Manufactures of Silk as therein also described, and so much of the Second Division of the said Table as permits Goods therein mentioned to be imported in Transit.
" "	" "	Sections 65, 79, 143, 176, 177, and 178.
" "	" "	The following Words in Section 234, viz., "or of any Tea or Silk, such Tea or Silk "being of the Value of Ten Pounds or "upwards," and "or of any such Tea or "Silk."
" "	" "	So much of the Table of Prohibitions containing the Words "or in Glass Bottles or "Stone Bottles not exceeding the Size of "Three Pint Bottles, and being really "Part of the Cargo of the importing Ship, "and duly reported."
" "	" "	So much of the 130th Section of "The Customs Consolidation Act, 1853, as requires a Comptroller of Customs to join with the Collector in preparing and making the Debentures and Certificates therein prescribed.
" "	" "	The Words "if she have any such Stores on board," in the last Paragraph of Section 145.
18 & 19 Vict. c. 96.	"The Supplemental Customs Consolidation Act, 1855."	Sections 12 and 23.
23 & 24 Vict. c. 110.	"The Customs Duties Consolidation Act, 1860."	So much thereof as imposes a Duty of £1, 1s. per Pair on the Importation of Dice.

CAP. LXXXV.

An Act to include the whole of the Burgh of Galashiels *within the County Sheriffdom, and Commissariat of* Selkirk.—[12th August 1867.]

WHEREAS the Town or Burgh of *Galashiels* is situated partly within the Jurisdiction of the Sheriff of *Selkirkshire* and partly within the Jurisdiction of the Sheriff of *Roxburghshire*, and great Inconvenience has thence arisen:

Be it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Town of Galashiels, as fixed under 25 & 26 Vict. c. 101, to be wholly in Selkirkshire.

I. The whole Territory contained within the Boundaries of the Town or Burgh of *Galashiels*, as the same have been fixed and defined under the General Police and Improvement (*Scotland*) Act, 1862, or as the same may be hereafter fixed and defined under the said Act, or by or under any other Act, and whether the said Territory shall heretofore have been locally situated within the County of *Selkirk* or the County of *Roxburgh*, shall from and after the First Day of *October* One thousand eight hundred and sixty-seven be held to be, and be for all Purposes whatsoever, except in so far as herein-after provided, Part of the County, Sheriffdom, and Commissariot of *Selkirk*.

Not to affect Taxation, or the Right of voting for Members of Parliament.

II. For all Purposes of the Acts regulating the Valuation of Lands and Heritages and the Registration of Voters the Lands and Heritages within the Territory specified in the First Section hereof shall continue to be and shall be deemed to be within the County or Sheriffdom in which they were severally locally situated before the passing of this Act, and nothing herein contained shall affect any Right or the Mode of levying and recovering, or any Obligation to pay, any Tax, Rate, or Impost, except any Rate levied under the Authority of the recited Act, or the Right of being registered as a Voter or of voting for a Rrepresentative in Parliament.

Pending Actions not to be affected.

III. Nothing herein contained shall affect any Action or Proceeding instituted or raised before the Courts of *Roxburghshire* previous to the said First Day of *October* One thousand eight hundred and sixty-seven, and the same shall be proceeded with, determined, and followed forth, by Diligence or otherwise, as if this Act had not passed.

CAP. XC.

An Act to alter certain duties and to amend the Laws relating to the Inland Revenue.—[12th August 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

As to Excise.

Alteration of Excise Duties on Licences to deal in Gold and Silver Plate.

I. In lieu of the Duties now payable in *Great Britain* on Licences to Persons trading in, vending, or selling Gold or Silver Plate, and in *Ireland* on Licences to Persons to sell or make Gold or Silver Plate, there shall from and after the Fifth Day of *July* One thousand eight hundred and sixty-seven be charged and paid the following Excise Duties on Licences to deal in Plate to be taken out yearly in the United Kingdom by the Persons herein-after mentioned; (that is to say,)

By every Person who shall trade in or sell any Article composed wholly or in part of Gold or Silver, in respect of every House, Shop, or other Place in which his Trade or Business shall be carried on—

Where the Gold shall be above Two Pennyweights and under Two Ounces in Weight, or the Silver above Five Pennyweights and under Thirty Ounces in Weight, the Sum of Two Pounds Six Shillings:

Where the Gold shall be of the Weight of Two Ounces or upwards, or the Silver of the Weight of Thirty Ounces or upwards, the Sum of Five Pounds Fifteen Shillings:

By every Person duly licensed as a Hawker, Pedlar, or Petty Chapman who shall sell in the ordinary Course of his trading as a Hawker, Pedlar, or Petty Chapman any Article composed wholly or in part of Gold or Silver, the same Duties as above mentioned according to the Weight of the Gold or Silver.

By every Pawnbroker who shall trade in or sell any Article composed wholly or in part of Gold or Silver, or who shall take in Pawn, or deliver out of Pawn, any such Article in respect of every House, Shop,

or other Place in which his Trade or Business shall be carried on, the sum of Five Pounds Fifteen Shillings:

By every Refiner of Gold or Silver in respect of every House, Shop, or other Place as aforesaid, the sum of Five Pounds Fifteen Shillings:

Provisions of former Acts to apply to the Duties on Plate Licences.

II. The Duties granted by this Act on Licences to deal in Plate and the said Licences shall be Excise Duties and Licences, and shall be under the Management of the Commissioners of Inland Revenue, and all the Powers, Provisions, Clauses, Regulations, and Directions contained in or imposed by any Act relating to Excise Duties or Licences, or to Penalties under Excise Acts, and now or hereafter in force, shall respectively be of full Force and Effect with respect to the Duties by this Act granted, and the Licences relating thereto, and to the Penalties hereby imposed, so far as the same are applicable, and shall be observed, applied, and enforced for and in the collecting, securing, and recovering of the said last-mentioned duties and Penalties hereby granted and imposed respectively, and the granting and Management of the said Licences, and otherwise in relation to the said Duties, Penalties, and Licences, so far as the same shall be consistent with and not superseded by the express Provisions of this Act, as fully and effectually as if the same had been herein repeated and specially enacted with reference to the said last-mentioned Duties, Penalties, and Licences respectively.

Penalty for dealing in Plate without Licence, 50*l.*

III. Every Person who shall do any Act, or carry on any Trade or Business for which a Licence to deal in Plate is required by this Act, without having in force a proper Licence authorizing him so to do, shall for every Offence forfeit the Sum of Fifty Pounds; and in any Proceeding for the Recovery of such Penalty it shall be sufficient to allege that the Defendant did deal in Plate without a proper Licence in that Behalf, and it shall not be necessary further or otherwise to describe the Offence.

Plate Licence not necessary for the Sale of Lace, Wire, &c.

IV. No Licence to deal in Plate shall be necessary to enable any Person to trade in, or sell, or to take in Pawn, or deliver out of Pawn, Gold or Silver Lace, or Gold or Silver Wire, Thread, or Fringe.

Goods sold for Gold or Silver to be deemed to be so.

V. All Articles sold or offered for Sale, or taken in Pawn or delivered out of Pawn, and alleged to be composed wholly or in part of Gold or Silver, shall, for the Purposes of this Act, be deemed and taken to be composed of Gold and Silver respectively as alleged; and if upon the Hearing of any Information for any Offence against this Act any Questions shall arise touching the Quantity of Gold or

Silver contained in any Article the Proof of such Quantity shall lie upon the Defendant.

Plate Licences to expire on 5th July in each Year.

VI. Every Licence to deal in Plate taken out under this Act shall be dated the Day on which the same shall be granted, and shall expire on the Fifth Day of *July* next after the granting of the same; Provided that every Person who at the Time of the passing of this Act shall be the Holder of a Licence to sell or make Gold or Silver Plate in *Ireland*, expiring on the Fifth Day of *January* in the Year One thousand eight hundred and sixty-eight, shall, if he shall take out a Licence to deal in Plate under this Act at any Time before the First Day of *February* in the same Year, be entitled to have the same upon Payment of One Half the Duty chargeable upon such Licence under this Act.

Repeal of Enactments specified in Schedule A.

VII. The several Sections and Parts of Sections of the Acts specified in the Schedule A. to this Act annexed shall be repealed, save as to any Duties due or in arrear, and as to any Penalties incurred on or before the passing of this Act.

Repealing so much of Acts as require Entries to be made by Coffee, Tea, and Tobacco Dealers.

VIII. So much of any Act as requires a Seller of or or Dealer in Coffee, Tea, Cocoa Nuts, or Chocolate to make Entry of any Premises for the keeping or selling the same is hereby repealed, and so much of any Act as requires a Dealer in and Retailer of Tobacco or Snuff to make Entry of any Premises for storing, keeping, or selling of Tobacco or Snuff is also hereby repealed: Provided that where a Manufacturer of Tobacco or Snuff shall be a Dealer therein or Retailer thereof in any Premises adjoining his Manufactory such Premises shall be entered together with the Manufactory.

Section 25 of 6 G. 4, c. 81, to continue in force with respect to Tea and Tobacco Dealers.

IX. Notwithstanding the Enactment contained in the preceding Section, the Provisions of Section Twenty-five of the Act of the Sixth of *George* the Fourth, Chapter Eighty-one, shall continue in force, and be deemed to apply to every Person who shall have taken out a Licence to trade in or sell Coffee, Tea, Cocoa Nuts, or Chocolate, or a Licence to deal in or sell Tobacco or Snuff; and in the Construction of the said Section Twenty-five in relation to such Person the Expression "entered Premises" shall be deemed to mean the Premises wherein his Trade or Business is exercised or carried on.

Power to Officers of Excise to examine Coffee, Tea, Tobacco, &c., in possession of Dealers.

X. It shall be lawful for any Officer of Excise at any Time (but if between the Hours of Eleven at Night and Five in the Morning, then in the presence of a Constable or other lawful Peace Officer,) to enter into the Premises of every Person who shall sell or deal in or who shall have taken out a Licence to sell or deal in Coffee, Tea, Cocoa

Nuts, Chocolate, Tobacco, or Snuff, and to examine all Coffee, Tea, Cocoa Nuts, Chocolate, Tobacco, or Snuff, in the Premises of such Person.

Part of Section 5 of 4 & 5 W. 4. c. 51, relating to Entries, repealed.

XI. So much of Section Five of the Act passed in the Fourth and Fifth Years of the Reign of King *William* the Fourth, Chapter Fifty-one, as enacts that the Officer of Excise who shall have received such Entry as is in the said Section mentioned shall copy the same into the Book kept and known by the name of the General Entry Book for the Division or Ride in which the House, Building, Room or Place, Vessel or Utensil described in such Entry shall be intended to be used, and that the Supervisor of the District shall examine and compare the Copy so made in such Book as aforesaid with the original Entry, is hereby repealed, except as to any Entry made before the passing of this Act.

Entries to be kept in a Book, which is to be Evidence in any legal Proceeding.

XII. The Commissioners of Inland Revenue shall furnish the Officer of Excise of every Division or Ride with a Book, to be called the General Entry Book of such Division or Ride, and such Officer upon receiving any such Entry as is mentioned in the said Fifth Section of the Act of the Fourth and Fifth of King *William* the Fourth, Chapter Fifty-one, shall forthwith securely affix the same in such Book, and such Officer on his being removed from such Division or Ride shall deliver over such Book, together with the Entries contained therein, to the Officer succeeding him in such Division or Ride; and where upon the Trial of any Indictment, Information, Action, Suit, or Prosecution, or upon any other legal or judicial Proceeding whatsoever, any Question shall be made or shall arise whether any House, Building, Room or Place, Vessel or Utensil of which Entry is required to be made under any Act of Parliament relating to the Revenue of Excise was entered by the Person by whom the same shall have been used, it shall be deemed and taken to be sufficient Proof of such Entry if upon the Production by any Officer of Excise of the said General Entry Book of the Division or Ride in which such House, Building, Room or Place, Vessel or Utensil shall have been used, such House, Building, Room or Place, Vessel or Utensil, shall be found in any Entry contained in such Book purporting to have been made by any such Person without further Evidence; and if upon the Production of such Book on such House, Building, Room or Place, Vessel or Utensil shall be found in any Entry contained therein, or if found shall appear to have been entered for another or different Purpose than the Purpose for which the same shall be charged or alleged to have been used by such Person, every such House, Building, Room or Place, Vessel or Utensil shall be deemed and taken to be unentered, unless by other

Evidence the contrary be made to appear: Provided always, that nothing herein contained shall be deemed to repeal or alter the Provisions of any former Act relating to the Proof of any such Entry as aforesaid made before the passing of this Act.

Sects. 4 & 5 of 1 W. 4. c. 64, relating to Beer Retailers Bonds, repealed.

XIII. Sections Four and Five of the Act passed in the First Year of the Reign of King *William* the Fourth, Chapter Sixty-four, relating to Bonds to be entered into by Persons requiring Licences to retail Beer under that Act, are hereby repealed.

Sect. 22 of Petty Sessions (Ireland) Act, 1851, not to apply to Penalties under 1 & 2 W. 4. c. 55, as to Illicit Distillation.

XIV. Whereas the Twenty-second Section of the Petty Sessions (*Ireland*) Act, 1851, contains a Provision that in every Case of summary Jurisdiction where the Justices shall be authorized to award any penal or other Sum they may order that the same shall be paid either forthwith or at such Time as they shall see fit to fix: Be it enacted, That the said Provision shall not extend to any Penalty which shall be awarded for any Offence committed against the Provisions of the Act of the First and Second Years of the Reign of King *William* the Fourth, Chapter Fifty-five, intituled *An Act to consolidate and amend the Laws for suppressing the illicit making of Malt and Distillation of Spirits in* Ireland.

Provisions contained in Sect. 8. of 25 Vict. c. 22. extended to all Brewers.

XV. The Provisions contained in the Eighth Section of the Act passed in the Twenty-fifth Year of the Reign of Her present Majesty, Chapter Twenty-two, shall extend to and be applied and put in force in the Case of every Brewer of Beer for Sale, whether he shall have taken out a Licence as a Brewer of Beer for Sale for the First Time or otherwise.

Sect. 19 of 19 & 20 Vict. c. 34, extended to roasted Malt in possession of a Brewer.

XVI. Whereas by the Nineteenth Section of the Act passed in the Nineteenth and Twentieth Years of the Reign of Her Majesty, Chapter Thirty-four, it is enacted, that all Corn or Grain found in the Custody or Possession of any Roaster of Malt or Dealer in Roasted Malt, which Corn or Grain shall not have germinated to such a Degree that the Plumule thereof shall have been elongated to the Extent of One Half of the Length of the Grain, shall be deemed to be unmalted Corn or Grain within the Meaning of an Act passed in the Second Session of Parliament holden in the Fifth Year of Her Majesty's Reign, Chapter Thirty: Be it enacted, That all roasted Corn or Grain found in the Custody or Possession of any Brewer of Beer for Sale which shall not have germinated to the Degree aforesaid, subject as in the recited Enactment is expressly provided, shall be deemed to be unmalted Corn or Grain within the Meaning of the Seventeenth Section of an Act passed in the First Year of the Reign of His late Majesty King *William* the Fourth, Chapter Fifty-one; and that all Corn or Grain,

Undried Malt in

whether roasted or unroasted, found in the Custody or Possession of any Roaster of Malt which shall not have been perfectly dried upon the Kiln at the Malthouse at which the same shall have been steeped to be made into Malt, shall also be deemed to be unmalted Corn or Grain within the Meaning of the said Act of the Second Session of Parliament holden in the Fifth Year of Her Majesty's Reign.

possession of a Malt Roaster to be deemed unmalted Grain.

XVII. If any Person shall solicit, take, or receive any Order for Spirits, Wine, or other Article, for the dealing in, retailing, or selling whereof an Excise Licence is by Law required, without having in force a proper Excise Licence authorising him so to do, he shall forfeit the Penalty imposed by Law upon a Person dealing in, retailing, or selling such Article without having an Excise Licence in force authorizing him so to do; and in any Case in which the Place of Business or Residence of the Offender shall not be known to the Officer of Excise who shall exhibit any Information for the Recovery of such Penalty as aforesaid, or, if known, shall be out of the United Kingdom, it shall be sufficient service of the Notice and Summons required to be given to a Defendant by any Law of Excise if the same be left at the House or Place where the Offender shall have solicited, taken, or received any such Order as aforesaid, addressed to such Offender: Provided always that, nothing herein contained shall be deemed to apply to the sale of any Spirits or Foreign Wine while the same shall be and remain in the Warehouse or Warehouses in which the same shall have been deposited, lodged, or secured according to Law, before Payment of Duty upon the Importation thereof, where such Spirits or Foreign Wine shall be sold in a Quantity not less than One hundred Gallons at One Time, or to impose a Penalty upon a *bona fide* Traveller taking Orders for Goods which his Employer is duly licensed to deal in or sell.

Penalty upon unlicensed Persons (not being Travellers for licensed Persons) soliciting Orders for Spirits, Wine, &c.

XVIII. After the First Day of *October* in the Year of our Lord One thousand eight hundred and sixty-seven the annual Duty payable upon a Licence to be taken out by a Retailer of Methylated Spirit under the Provisions contained in the Act passed in the Twenty-fourth and Twenty-fifth Years of Her Majesty's Reign, Chapter Ninety-one, shall be the sum of Ten Shillings.

Reduction of Duty on Licences to Retailers of Methylated Spirit.

XIX. Whereas by an Act passed in the Fifth and Sixth Years of Her Majesty's Reign, Chapter Ninety-three, Lime Water is permitted to be used in the Manufacture of *Welsh* and *Irish* Snuff, and it is expedient to limit the Quantity of Lime that may be used in such Manufacture: Be it enacted, That if any Person being a Manufacturer of, Dealer in, or

Lime and Magnesia in Snuff not to exceed certain Proportions.

Retailer of Tobacco or Snuff shall have in his Custody or Possession any Snuff in which on Examination thereof there shall be found to be any Quantity of the Oxides of Calcium and Magnesium, or of either of such Oxides, exceeding by One *per Centum* the Proportion of the Quantity of such Oxides contained in the Tobacco or Tobacco Stalks or Returns of Tobacco from which such Snuff shall have been manufactured or shall be in course of Manufacture, or if any such Person shall have in his Custody or Possession any Snuff in which on Examination thereof there shall be found any Quantity of the said Oxides, or of either of them, exceeding the Proportion of Thirteen Pounds Weight of such Oxides in every Hundred Pounds Weight of such Snuff, he shall forfeit Two hundred Pounds and also the said Snuff: Provided that any sample of Snuff, Tobacco, or Tobacco Stalks or Returns of Tobacco which shall be examined for the Purpose of ascertaining the Quantity of the said Oxides contained therein shall first be dried at a Temperature of Two hundred and twelve Degrees as denoted by *Fahrenheit's* Thermometer; and for the Purposes of this Section the Term "Snuff" shall include all Snuff and all Tobacco, Tobacco Stalks and Returns of Tobacco, which shall be in course of Manufacture into Snuff.

As to Stamps.

Stamp Duties granted on certain Documents. Letters of Allotment.

XX. From and after the passing of this Act the following Documents shall be charged with the Stamp Duty of One Penny; that is to say,

Letter of Allotment of any Share of any Company or proposed Company, or in respect of any Loan raised or proposed to be raised by any such Company, or Letter of Allotment issued or delivered in the United Kingdom of any Share of any Foreign or Colonial Company or proposed Company, or in respect of any Loan raised or proposed to be raised by or on behalf of any Foreign or Colonial Government, State, Company, or Corporation; and the Term "Letter of Allotment" hereinbefore used shall include Letter of Renunciation or other Document having the Effect of a Letter of Allotment in favour of any Person:

Scrip Certificates.

Scrip Certificate or other Document entitling any Person to become the Proprietor of any Share of any Company or proposed Company, or Script Certificate or other Document issued or delivered in the United Kingdom entitling any Person to become

the Proprietor of any Share of any Foreign or Colonial Company or proposed Company:

Scrip. Scrip or other Document denoting of intended to denote the Right or any Person as a Subscriber in respect of any Loan raised or proposed to be raised by any Company, or any Scrip or other Document issued or delivered in the United Kingdom denoting or intended to denote the Right of any Person as a Subscriber in respect of any Loan raised or proposed to be raised by or on behalf of any Foreign or Colonial Government, State, Company, or Corporation.

Penalty for signing, &c., Documents chargeable with Duty before stamped.

XXI. If any Person shall sign, grant, issue, or deliver any Document chargeable with Stamp Duty under the Provisions of the Section lastly herein-before contained, before the same shall be duly stamped for denoting the said Duty, he shall forfeit the sum of Twenty Pounds.

Section 8 of 16 & 17 Vict. c. 63 repealed.

XXII. Section Eight of the Act of the Sixteenth and Seventeenth Years of Her Majesty's Reign, Chapter Sixty-three is hereby repealed.

Stamp Duties on Transfer of certain Bonds.

XXIII. The Stamp Duties chargeable under an Act passed in the Thirteenth and Fourteenth Years of Her Majesty's Reign, Chapter Ninety-seven, on the Transfer or Assignment, Disposition or Assignation of Bonds shall cease and determine, and from and after the passing of this Act there shall be charged and paid for and upon every Transfer or Assignment, Disposition or Assignation of any Bond given as a Security for the Payment or Repayment of Money, or for the Transfer or Retransfer of any Share in any of the Stocks or Funds mentioned in the Schedule to the said Act, and of any Bond, Debenture, or other Security charged with Stamp Duty by an Act passed in the Twenty-fifth Year of Her Majesty's Reign, Chapter Twenty-two, the following Stamp Duties; (that is to say,) for every full Sum of One hundred Pounds, and also for any fractional Part of One hundred Pounds, thereby transferred, assigned, or disponed of the Amount or Value of the Principal Money or Stock secured by such Bond, Debenture, or other Security, or of the Penalty of the Bond in respect whereof the same is charged with Duty, as the Case may be, the Duty of Sixpence: Provided always, that in the Case of a Bond charged with the fixed maximum Duty of One Pound or One Pound Fifteen Shillings no Transfer, Assignment, Disposition, or Assignation thereof hereby charged shall be chargeable under this Act with more than the Amount of such fixed maximum Duty.

Certain Licences

XXIV. No Stamp Duty shall be chargeable for or upon any Licence to be granted by any Archbishop, Bishop,

granted by Ecclesiastical Authority not chargeable with Stamp Duty.

Chancellor, or other Ordinary in *England* or *Ireland*, or by any Presbytery or other Ecclesiastical Power in *Scotland*, for the Purpose of authorizing or enabling any Person to preach or exercise any other Spiritual Function, such Licence not being a Licence to hold the Office of Lecturer, Reader, or Chaplain, and there being no Salary or Emolument for, or attached to, the Exercise of the Function for which such Licence may be granted.

As to Taxes.

As to Exemption of Trade Premises from Inhabited House Duty.

XXV. From and after the Fifth Day of *April* One thousand eight hundred and sixty-seven, in order to entitle the Occupier of any Tenement or Building, or Part of a Tenement or Building, to Exemption from Inhabited House Duties on the Ground of such Premises being occupied as a House for the Purposes of Trade only, or as a Warehouse for the sole Purpose of lodging Goods, Wares, or Merchandise therein, or as a Shop or Counting-house, or being used as Offices or Counting-house, it shall not be necessary to prove, nor shall Proof be required, that such Occupier resides in a separate and distinct Dwelling House or Part of a Dwelling House charged with the said Duties.

Extending Time for hearing Appeals.

XXVI. From and after the passing of this Act it shall be lawful for the Commissioners executing the several Acts relating to the Duties of Assessed Taxes to hear and determine Appeals against Charges certified under the said Acts at any Time within Twenty-one Days after the Close of the Year to which such Charges relate.

SCHEDULE A., containing the Enactments repealed by Section 7. of this Act.

Act.	Subject.	Extent of Repeal.
31 Geo. 2. c. 32.	For granting a Duty on Licences to be taken out by all Persons dealing in Gold or Silver Plate, &c., &c.	Sections 2, 3 4, 6, 7, 10, 11, 12, 13.
Geo. 2. c. 24.	To amend the Law relating to Licences to deal in Gold and Silver Plate.	Sections 1, 2, 3, 4, 5, 6, 7, 8.
59 Geo. 3. c. 32.	To continue an Act granting additional Duties of Excise.	Section 3.
6 Geo. 4. c. 118.	To transfer Collection of Plate Licences from Commissioners of Excise to Commissioners of Stamps.	So much of Section 1 as relates to Licences to Persons to sell or make Gold or Silver Plate in Ireland.—Sections 2, 3.
9 Geo. 4. c. 49.	To amend the Laws relating to Licences to Dealers in Gold and Silver Plate, &c, &c.	So much of Section 12 as relates to Licences to deal in Plate.
5 & 6 Vict. c. 82.	To assimilate the Stamp Duties in Great Britain and Ireland, &c., &c.	So much of Section 2 as relates to Licences to Persons to sell or make Gold or Silver Plate in Ireland.

CAP. XCVI.

An Act to facilitate the Recovery of certain Debts in the Sheriff Courts in Scotland.—[12*th* August 1867.]

WHEREAS an Act was passed in the First Year of the Reign of Her present Majesty, intituled *An Act for the more effectual Recovery of Small Debts in the Sheriff Courts and for regulating the establishment of Circuit Courts for the Trial of Small Debt Causes by the Sheriffs, in* Scotland; and another Act was passed in the Session of Parliament held in the Sixteenth and Seventeenth Years of the Reign of Her present Majesty, intituled *An Act to facilitate Procedure in the Sheriff Courts in* Scotland: 7 W. 4 & 1 Vict. c. 41. 16 & 17 Vict. c. 80.

And whereas it is expedient to make farther Provision to facilitate the Recovery of certain Debts in the Sheriff Courts in *Scotland*:

Be it therefore enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act shall be cited for all Purposes as the "Debts Recovery (*Scotland*) Act, 1867." Short Title.

II. From and after the passing of this Act, it shall be lawful for any Sheriff in *Scotland*, within his Sheriffdom, to hear, try, and determine in a summary Way, as more particularly herein-after mentioned, all Actions of Debt that may competently be brought before him for House Maills, Men's Ordinaries, Servants Fees, Merchants Accounts, and other the like Debts, wherein the Debt shall exceed the Value of Twelve Pounds Sterling, exclusive of Expenses and Dues of Extract, but shall not exceed the Value of Fifty Pounds Sterling, exclusive as aforesaid: Provided always, that the Pursuer shall in all Cases be held to have passed from and abandoned any remaining Portion of any such Debt beyond the Sum actually concluded for in any such Action. Causes between £12 and £50 which may be tried under this Act.

III. All such Actions which the Pursuers thereof shall choose to have heard and determined according to the summary Mode hereby provided shall proceed upon Summons or Complaint, agreeably to the Form and subject to all the Provisions contained in the Third Section of the first-recited Act and relative Schedules, except as herein provided: Provided always, that the Summons or Complaint shall not contain and shall not constitute a Warrant to cite Witnesses or Havers. Proceedings to begin by Summons or Complaint, as in Sect. 3 of 7 W. 4 & 1 Vict. c. 41.

Parties may appear by Procurators.

IV. In all Actions under this Act it shall be competent for the Parties or any of them to appear and plead personally, or by any Person *bonâ fide* employed by them in their usual Business, or by a Procurator of Court; and, except in Applications for Sequestration and Sale of a Tenant's Effects for Recovery of Rent, it shall be competent for Agents qualified to practise before the Court of Session to act as Procurators or Agents before the Sheriff Court of *Edinburgh* in any Cause exceeding the Value of Twenty-five Pounds, exclusive of Expenses and Dues of Extract raised under the Authority of this Act, so long as such Cause is not remitted to the ordinary Roll of such Sheriff Court.

Certain Sections of 7 W. 4 & 1 Vict. c. 41, incorporated with this Act.

V. The Provisions contained in the Third, Fifth, Sixth, Eighth, Ninth, Tenth, Twelfth, Eighteenth, Nineteenth, Twenty-first, Twenty-third, Twenty-fourth, Twenty-fifth, Twenty-sixth, Twenty-eighth, Thirty-fourth, Thirty-fifth, and Thirty-sixth Sections of the first recited Act and relative Schedules shall be held as incorporated in the present Act, except in so far as they may be inconsistent with any of the Provisions hereof: Provided always, that the foresaid Sections of the first-recited Act shall for the Purposes of this Act be read and construed as if they expressly related to Actions of the Nature and Value set forth in the Second Section of this Act, instead of to Actions of the Nature and Value set forth in the said Sections of the first-recited Act, or in the Twenty-sixth Section of the second-recited Act, and farther that the Fifth Section of the said first-recited Act shall be read and construed as if it related expressly to the Recovery of Rents or Balances of Rents exceeding Twelve Pounds and not exceeding Fifty Pounds Sterling, and that the Tenth Section of the said Act shall be read and construed as if it related expressly to the Distribution of Funds or Subjects exceeding the Value of Twelve Pounds and not exceeding the Value of Fifty Pounds Sterling, and that the counter Claims or Claims in Actions of Multiple-poinding which may be made under the Authority of this Act shall be of the Nature and Value set forth in the Second Section hereof, and that wherever in the foresaid Sections of the said first-recited Act the Words "Ordinary Small Debt Court," or "Circuit Small Debt Court," or such like Words, are used, they shall for the Purposes of this Act be held to mean and include Ordinary Courts or Circuit Courts at which Causes tried under the Authority of this Act are or may be set down for Trial: Provided also, that if any Person shall make a Claim in any Action of Multiple-poinding raised under the Authority of this Act, or a Counter Claim in any

other Action raised under this Act, which Claim or counter Claim, as the Case may be, is not of the Nature and Value set forth in the Second Section hereof, the Sheriff shall, if he thinks fit, remit the Action to his ordinary Roll: Provided farther, that, notwithstanding the Terms of the Sixth Section of the first-recited Act, Arrestments laid on under the Authority of this Act shall not prescribe till the Expiry of Three Years, according to the Provisions of the Twenty-second Section of an Act passed in the First and Second Years of the Reign of Her present Majesty, intituled *An Act to amend the Law of* Scotland *in Matters relating to Personal Diligence, Arrestments, and Poindings.* 1 & 2 Vict. c. 114.

Decrees in Absence, and their Effect.

VI. When the Defender who has been duly cited shall fail to appear he shall be held confessed, and the other Party shall obtain Decree against him; and in like Manner if the Pursuer shall fail to appear the Defender shall obtain Decree of Absolvitor, unless in either Case a sufficient Excuse for Delay shall be stated, on which Account it shall at all times be competent for the Sheriff to adjourn any Case to the next or any other Court Day, and to any Place at which he holds a Court for the Trial of Causes under this Act or any other Act, and to ordain the Parties then to attend: Provided always, that a Decree in Absence (Condemnator or Absolvitor) obtained under this Act shall be as nearly as may be in the same Form, and shall have the same Force and Effect, and be followed by the like Execution and Diligence, as a Decree in Absence obtained under the first-recited Act.

Hearing in Cases of Decree in Absence.

VII. The Provisions contained in the Sixteenth Section of the first-recited Act shall be held as incorporated in the present Act: Provided always, that it shall not be competent to insert in the Warrant for Hearing any Warrant to cite Witnesses and Havers: Provided also, that, notwithstanding the Terms of the said Sixteenth Section, it shall be competent for the Pursuer of any Action under the Authority of this Act, against whom Decree of Absolvitor has passed in Absence, to apply for and obtain a Warrant for Hearing at any Time within Three Calendar Months thereafter, in the same Manner and under the same Conditions as those provided in the said Sixteenth Section, and such Warrant for Hearing shall have the like Force and Effect as if obtained under the said Section.

If Case unsuitable for Summary Trial, Sheriff may remit to ordinary Roll

VIII. Where both Parties shall appear at the Diet mentioned in the Summons and Complaint, or at any Adjournment thereof, or at the Diet for Hearing under the immediately preceding Section, the Sheriff shall inquire into the Nature of the Action and of the Defence thereto, and shall make a short Note of the Pleas of Parties (herein-after

called the Note of Pleas), which shall form Part of the Process; and where it shall appear to the Sheriff that the Case is of such a Nature that it cannot, with due Regard to the Ends of Justice, be disposed of according to the Summary Procedure provided by this Act, he may remit the same to his ordinary Roll; and the Case, being so remitted, shall be proceeded with in the same manner as cases remitted under the first-recited Act from the Small Debt Roll to the ordinary Roll of the Sheriff Court are now proceeded with; and it shall not be competent to take any Objection that such Case so remitted was not of the Nature or Value set forth in the Second Section hereof; but if it shall not appear to be necessary for the Ends of Justice that the Case should be remitted to the ordinary Roll, the Sheriff shall fix a Time (which shall be as early as may be) and Place for proceeding to try and determine the same, and shall ordain the Parties then to attend, and shall grant Warrant to cite Witnesses and Havers (which Warrant shall be signed by the Sheriff Clerk and shall have the same Force and Effect as if it had been contained in the Summons and Complaint); and at said Time and Place, or at some adjourned Time and Place (which adjournment the Sheriff shall only grant when the Ends of Justice require it), the Sheriff shall proceed to hear the Parties *viva voce*, and examine Witnesses or Havers upon Oath, and may also examine the Parties, and may put them or any of them upon Oath, and, if he should see Cause, may remit to Persons of Skill to report, or to any Person competent to take and report in Writing, the Evidence of Witnesses or Havers, or the Oath of any Party who may be unable to attend, upon special Cause shown, and such Cause shall in all Cases be entered in the Book of Causes kept by the Sheriff Clerk herein-after mentioned, due Notice of the Examination being given to both Parties, and thereupon the Sheriff may pronounce Judgment, and the Judgment shall, unless appealed from as after mentioned, be as nearly as may be in the same Form, and shall have the same Force and Effect, and be followed by the like Execution and Diligence, as a Decree obtained under the Thirteenth Section of the first-recited Act.

otherwise shall hear Case and give Judgment.

IX. Unless required by either Party, it shall not be necessary for the Sheriff to take any Note of the Evidence or of the Facts admitted by the Parties, but upon such Requisition, which shall only be competently made before any Parole Evidence has been led, and not afterwards, he shall take a Note of the Evidence and of the Facts admitted (herein-after called the Note of Evidence), setting forth the Witnesses examined and the Testimony given by each,

If required, Sheriff shall take Note of Evidence and pronounce Findings in Law and Fact.

and the Documents adduced, and any Evidence, whether oral or written, tendered and rejected, with the Ground of such Rejection, and a Note of any Objections taken to the Admission of Evidence, whether oral or written, allowed to be received, which Note of the Evidence shall be forthwith lodged in Process; and the Sheriff Clerk shall mark the Documents admitted in Evidence, and also separately any Documents tendered and rejected; and the Diet of Proof shall not be adjourned unless on special Cause shown, which shall be set forth in the Note of Evidence at the Time of making the Adjournment: Provided always, that the Sheriff shall either take such Note with his own Hand, or may dictate it to a Clerk, or, on the motion of either of the Parties and in the meantime at the Expense of the Party or Parties so moving (said Expenses to be ultimately disposed of as Expenses in the Cause), to a Writer skilled in Shorthand Writing, to whom the Oath De fideli administratione officii shall be administered; and the said Shorthand Writer shall afterwards write out in full the Note of Evidence so taken by him, and the Sheriff shall certify the same as correct, and the Evidence of such Witness shall be read over to him and shall be signed by him except where it shall have been taken in Shorthand; and where the Evidence has been recorded as above provided for, the Sheriff shall pronounce and sign and date an Interlocutor, setting forth the separate Findings in Law and in Fact upon which he has proceeded in giving Judgment; and such Interlocutor shall form Part of the Process, and if not appealed from, as herein-after provided, shall be final and conclusive, and not subject to Review by any Court whatever: and the Judgment of the Sheriff shall at the Expiry of the Time allowed for Appeal herein-after mentioned, and if not appealed from during the same, be extracted, as nearly as may be, in the Mode provided in the Thirteenth Section and relative Schedule of the first-recited Act, and shall have the same Force and Effect, and be followed by the like Execution and Diligence, as a Decree obtained under the last mentioned Section of the said first-recited Act.

Appeal competent only when Note of Evidence taken.

X. Where neither Party has, in the Manner above provided, required the Sheriff to take a Note of the Evidence, it shall not be competent to appeal against the Judgment which he shall pronounce, in so far as the Findings in Fact pronounced by him are concerned, and the said Findings shall be final and conclusive, and not subject to Review by any Court whatever: Provided also, that it shall not in any Case be competent to appeal until Judgment has been pronounced by the Sheriff finally disposing of the Cause,

but an Appeal when taken shall have the Effect of submitting to Review all the previous Proceedings and Interlocutors.

Appeal where Case heard by Sheriff Substitute.

XI. Subject to the Provisions contained in the immediately preceding Section, where the Case has been heard and the Judgment has been given by the Sheriff Substitute, it shall be competent for either Party to appeal against such Judgment to the Sheriff; and the Party who proposes to appeal against the same shall, within Eight Days, or in Cases depending before the Sheriff of *Orkney* and *Shetland* within Sixteen Days, from the Date of the Interlocutor before mentioned, engross and sign, by himself or by his Procurator, under the said Interlocutor, the Words, "I appeal against the Judgment of the Sheriff Substitute" (failing which the Judgment of the Sheriff Substitute shall be, as hereinbefore provided, final and conclusive, and not subject to Review by any Court whatever); and it shall be competent for the Appellant to subjoin to his Appeal at the Time of engrossing it a Note of the Legal Authorities upon which he founds; and the Sheriff Clerk shall forthwith transmit to the Sheriff the Summons or Complaint, the Interlocutor of the Sheriff Substitute, the Note of Pleas, and the Note of Evidence, with the Productions made, if any, and the Sheriff shall without Delay consider the Appeal, and shall affirm or alter the Judgment of the Sheriff Substitute, and shall without delay pronounce such Judgment as may be right, and shall set forth in an Interlocutor (which he shall transmit along with the Process to the Sheriff Clerk) the Terms of his Judgment; and if he shall have altered that of the Sheriff Substitute, he shall set forth the Findings in Fact and Law upon which he proceeded in giving Judgment: Provided always, that, if it shall seem proper, the Sheriff may order the Case to be reheard, and the Evidence in the Cause taken of new or additional Evidence therein to be taken, either before himself or before the Sheriff Substitute, or before a Commissioner if otherwise competent, with such Instructions as he shall deem right; and the Judgment of the Sheriff shall at the Expiry of the Period allowed for Appeal herein-after mentioned, and if not appealed from during the same, be extracted as nearly as may be in the same Mode, and shall have the same Force and Effect, and be followed by the like Execution and Diligence, as a Decree obtained under the Thirteenth Section of the first-recited Act and relative Schedule.

Appeal where Case heard by Sheriff Depute in

XII. Subject to the Provisions contained in the Tenth Section hereof, and where the Cause exceeds the Value of Twenty-five Pounds Sterling, where the Case has been

heard and the Judgment pronounced by the Sheriff (and not by the Sheriff Substitute) in the first instance, it shall be competent for either Party to appeal against such Judgment to either of the Divisions of the Court of Session, and the Party who proposes to appeal against such Judgment shall, within Eight Days, or in Cases depending before the Sheriff of *Orkney* and *Shetland* within Sixteen Days, from the Date of the Sheriff's Interlocutor before mentioned, engross and sign, by himself or by his Procurator, under the said Interlocutor, the Words, "I appeal against the Judgment of the Sheriff to the Division of the Court of Session" (failing which the Judgment of the Sheriff shall, as herein-before provided, be final and conclusive, and not subject to Review by any Court whatever); and the Sheriff Clerk shall forthwith transmit to One of the Principal Clerks of the Division to which the Appeal is taken (or to One of the Principal Clerks of the First Division if the Division is not named in the Appeal) the whole Process; and the Division shall, when the Cause is brought before them as herein-after provided, hear the Appeal without any written Pleadings, and shall affirm or alter the Judgment of the Sheriff, and shall remit to him, or to the Sheriff Substitute, to decern accordingly, or to pronounce such other Judgment as shall seem just; and such Decree shall be extracted, as nearly as may be, in the same Mode, and shall have the same Force and Effect, and be followed by the like Execution and Diligence, as a Decree obtained under the Thirteenth Section of the first-recited Act: Provided always, that if shall seem proper, the Division may order the Case to be reheard, and the Evidence taken of new or additional Evidence to be taken by the Sheriff or Sheriff Substitute, with such Directions as shall seem right; and the Decree pronounced by the Sheriff or Sheriff Substitute upon such Rehearing shall be treated in all respects as if it had been pronounced by the Sheriff or Sheriff Substitute in the first instance: Provided also, that any Judgment or Order pronounced by the Division shall be final and conclusive, and not subject to Review by any Court.

first instance.

XIII. Where the Case has been heard by the Sheriff on Appeal, and Judgment pronounced by him as above provided for, it shall be the Duty of the Sheriff Clerk immediately on receiving the Sheriff's Interlocutor, to transmit a Copy thereof through the Post Office to the Parties or their Procurators; and within Eight Days, or within the Sheriffdom of *Orkney* and *Shetland* within Sixteen Days, after the Date of such Transmission it shall be competent for either of the Parties to appeal against his (the Sheriff's)

Appeal where Case heard by Sheriff on Appeal from the Sheriff Substitute.

Judgment in the same Manner, and to the same Effect, and under the same Limitations as provided for in the immediately preceding Section with regard to Appeals from Judgments of the Sheriff in the first instance.

As to Printing of Papers on Appeal to Court of Session.

XIV. When a Process shall be transmitted by the Sheriff Clerk to One of the Principal Clerks of either Division in the Court of Session as herein-before provided, the Clerk to whom the Process is so transmitted shall engross under the Appeal a Certificate setting forth the Date when he received the Process; and the Party insisting in the Appeal shall within Ten Days of such Date, if the Court be then sitting, or on or before the Third Sederunt Day in the next ensuing Session if the Process shall be received as aforesaid during Vacation or Recess, apply by written Note to the Lord President of the Division to which the Appeal has been taken, the presenting of which Note he shall at the same Time intimate by Letter to the Respondent or his known Agent, craving his Lordship to move the Court to order the said Appeal to the Summer Roll; and it shall be competent for such Division, before hearing such Appeal, to order the Appellant to print and box such Papers as shall be necessary, and to furnish such printed Copies thereof to the Respondent as they shall direct; and the Expense of such Printing shall, in the first instance, be borne by the Appellant, but shall afterwards be treated as Part of the general Expenses of the Appeal: Provided always, that if the Appellant shall fail to bring his Appeal before the Division, by Note as aforesaid, he shall be held to have fallen from the same, and the Process shall forthwith be re-transmitted to the Sheriff Clerk, and the Judgment complained of shall thereupon become final, and shall be treated in all respects in like Manner as if no Appeal had been taken against the same.

Book of Causes, &c., to be kept.

XV. The Sheriff Clerk shall keep a Book wherein shall be entered all Causes conducted under the Authority of this Act, setting forth the Names and Designations of the Parties, and whether present or absent at the calling of the Cause, the Nature and Amount of the Claim, and Date of giving it in, the Mode of Citation, the several Deliverances or Interlocutors of the Sheriff (except those Interlocutors setting forth at Length the separate Findings in Law and in Fact upon which any Judgment of the Sheriff shall have proceeded, of which Interlocutors the Dates only shall be entered in the Book of Causes), the Dates of Appeal, if any, and the Final Decree, with the Date thereof, which Book shall be signed each Court Day by the Sheriff; and the said Entries by the Clerk shall be according to the Schedule (A.) annexed to this Act, or with such Additions

as the Sheriff shall appoint; and the Sheriff Clerk shall also keep a Book in which he shall enter, in the Form of Schedule (B.) annexed to this Act, every Cause transmitted to the Sheriff or Sheriff Substitute in order to be advised, specifying the Sheriff to whom the same has been transmitted, the Date of such Transmission, the Date of the Cause being returned advised by the Sheriff or Sheriff Substitute, the Date of intimating the Sheriff's Judgment to the Parties, the Date of transmitting the Cause or Appeal to the Court of Session, the Date of the Cause being returned advised by the Court of Session or being returned in consequence of the Appeal having fallen for want of being insisted in, and any Remarks which the Sheriff may have ordered to be entered in such Book relative to any such Cause; and the Sheriff Clerk shall further keep a Book or Books containing a Register or Registers of all Indorsations of Decrees and Warrants issued in other Counties, and of all Sequestrations and of all Reports of all Poindings and Sales of Goods and Effects under Sequestrations or Poindings, which Registers shall be open and patent at Office Hours to all concerned, without Fee; and the Sheriff Clerk shall make up a Roll of the Causes to be tried on each Court Day under this Act, separate from the Roll of Causes to be tried under the said recited Acts, and shall cause a Copy thereof to be exhibited to the Public on a Patent Part of the Court House at least One Hour before the Time of Meeting of such Court, and which shall continue there during the Time the Court shall be sitting; and the Sheriff Clerk, or an Officer of Court, shall audibly call the Causes in such Roll in their Order.

Appraisement and Sale of poinded and sequestrated Effects.

XVI. The Twentieth Section of the first-recited Act and relative Schedule shall be held as incorporated in the present Act: Provided always, that the Words "Poinding and Sale" in said Section and relative Schedule shall, for the Purposes of this Act, be read and construed to include Poindings on which no Sale has followed, as well as Poindings which have been followed by Sale of the poinded Goods and Effects.

Decrees, &c. not subject to Review, except as hereby provided.

XVII. No Interlocutor, Judgment, Order, or Decree pronounced under the Authority of this Act shall be subject to Reduction, Advocation, Suspension, or Appeal, or any other Form of Review or Stay of Diligence, except as herein provided, on any Ground whatever.

Fees to be taken.

XVIII. The following and no other or higher Fees or Dues of Consignation shall be allowed to be taken for any Matters done in any Cause raised under the Authority of this Act (except the Fees of Shorthand Writers or of Witnesses, or of Reporters or Commissioners appointed by the Sheriff under the Eighth Section hereof, which the Sheriff

is hereby empowered to fix and decern for as he shall think just, and except also the Expenses incurred in any Appeal to the Court of Session, which shall be taxed and decerned for in common Form):

Sheriff Clerk's Fees.

Summons, including Precept of Arrestment, Two Shillings:

Each copy for Service, Sixpence:

Entering in Procedure Book, Sixpence:

Warrant to cite Witnesses and Havers, One Shilling:

Certificate loosing Arrestment, One Shilling:

Bond of Caution, One Shilling and Sixpence:

Second Diligence against Witnesses and Havers, One Shilling:

Decree, including Extract, if demanded, One Shilling:

Hearing after Decree in Absence, One Shilling and Sixpence:

Indorsation of Decree or Warrant, and entering in Book, One Shilling:

Receiving Report of Sequestration or Poinding, and entering in Book, One Shilling:

Receiving Report of Sale under Sequestration or Poinding, and entering in Book, One Shilling and Sixpence:

Transmitting Process on Appeal to Sheriff, Sixpence:

Intimating Judgment of Sheriff to each Pursuer or Defender, Sixpence:

Transmitting Process on Appeal to the Court of Session, Sixpence.

Officer's Fees including Assistants or Witnesses.

Citation of a Party, or Intimation of counter Claim and Execution, One Shilling and Sixpence:

Citation of a Witness or Haver, and Execution, Ninepence:

Charging on Decree, and returning Execution of Charge, One Shilling and Sixpence:

Arrestment, and returning Execution thereof, One Shilling and Sixpence:

Intimation of loosing Arrestment, and Execution thereof, One Shilling and Sixpence:

Poinding, Inventory, and Report, including Fee to Appraisers serving Copy and Execution, Ten Shillings:

Sale and Report, Ten Shillings:

Officer's Travelling Expenses, for each complete Mile from the Cross or Tron, or other usual Place of Measure-

ment in the Town or Place where the Court is held, where there is any such, or, if there be none such, then from the Court House of such Town or Place to the Place of Execution or Service, the Distance travelled in returning after Execution of the Duty not to be reckoned, Eightpence:

Assistants, each, *per* Mile, in the same Manner, Fourpence.

Crier's Fee.

For calling each Cause, One Penny, payable when Summons issued.

Procurator's Fees, applicable either to Pursuers or Defender's Procurator.

I.—Conduct of Cause.

1. On Decree in Absence (Absolvitor or Condemnator), and procuring Extract thereof:
   (1.) Where the Sum concluded for (exclusive of Expenses and Dues of Extract) does not exceed Twenty-five Pounds,—Seven Shillings and Sixpence:
   (2.) Where the Sum concluded for (exclusive of Expenses and Dues of Extract) exceeds Twenty-five Pounds,—Ten Shillings:
2. On Decree or Judgment in a contested Cause (whether the same shall have been appealed to the Sheriff or not), and procuring Extract thereof:
   (1.) Where the Sum concluded for (exclusive of Expenses and Dues of Extract) exceeds Twelve Pounds and does not exceed Twenty Pounds,—Thirty Shillings:
   (2.) Where the Sum concluded for (exclusive as aforesaid) exceeds Twenty Pounds and does not exceed Thirty Pounds,—Forty Shillings:
   (3.) Where the Sum concluded for (exclusive as aforesaid) exceeds Thirty Pounds and does not exceed Forty Pounds,—Sixty Shillings:
   (4.) Where the Sum concluded for (exclusive as aforesaid) exceeds Forty Pounds and does not exceed Fifty Pounds,—Eighty Shillings:
3. For Decree in Absence or in Foro in an Action of Forthcoming, Sequestration, or Multiplepoinding, same as in an ordinary Action.

The above Fees shall be exclusive of Postages and actual Outlays, but shall include the whole Sums Exigible,

whether as between Party and Party or between Client and Agent, for taking Instructions to prosecute or defend the Action, instructing Officers to cite Parties or Witnesses, or to arrest on the Dependence, revising Summons and Citations and Executions, precognoscing Witnesses, attending Proofs and Debates, writing and signing Appeals, Correspondence, and generally doing everything requisite for commencing and carrying on the Action or the Defence, until final Judgment or Decree in the Sheriff Court.

II.—Execution of Diligence.

1. Where Poinding or Imprisonment has followed on the Decree, or where a Sale has followed on a Decree of Sequestration, including instructing Officer to arrest, charge, poind, sell, or imprison, revising his Executions and Reports, Correspondence, receiving Payment of Sums in Decree, and handing same over to Creditor:
   (1.) Where the Amount decerned for (exclusive of Expenses and Dues of Extract) does not exceed Twenty-five Pounds, Three *per Centum* on the Amount decerned for; but no Fee to be less than Nine Shillings:
   (2.) Where the Amount decerned for (exclusive of Expenses and Dues of Extract) exceeds Twenty-five Pounds, Two *per Centum* on the Amount decerned for; but no Fee to be less than Fifteen Shillings:
2. Where neither Poinding nor Sale nor Imprisonment has followed, One Half of the above, both with respect to the maximum and minimum Fees: Provided always, that where any Cause shall have been conducted, under the Fourth Section hereof, partly by a Solicitor at Law and partly by a Writer to the Signet or Solicitor before the Supreme Courts, the Sheriff shall determine what Portion of said Fees shall be payable to each of the Agents or Procurators who shall have been so engaged in the Cause, and the Sheriff's Determination shall be final.

Table of Fees to be printed and hung up.

XIX. An exact copy of the immediately preceding Section of this Act shall be at all times hung up in every Sheriff Clerk's Office and in every Sheriff Court Place during the holding of any Court for the Trial of Causes under the Authority of this Act; and any Sheriff Clerk at any time omitting to have such Copy hung up in his Office or in the Sheriff Court Place as aforesaid, or not causing the Roll of Causes each Court day to be publicly exhibited, or

not causing the Number and Names of the Parties in such Roll to be called in their Order as aforesaid, except with Leave of the Sheriff, upon Cause shown in open Court, shall be liable in a Penalty not exceeding Forty Shillings, to be recovered at the Instance of any Person who shall prosecute for the same, and to be disposed of as the Sheriff shall direct: Provided always, that the Sheriff Clerk shall be bound to account for the Fees drawn by him under the Authority of this Act in the same manner as he is now by Law bound to account for the Fees drawn by him under the Authority of the first recited Act, but no farther or otherwise.

Court of Session to revise Table of Fees.

XX. The Court of Session in *Scotland* shall be and is hereby authorized and empowered, after due Inquiry, by Act or by Acts of Sederunt, from Time to Time to make such Alterations by way of Increase or Decrease as to said Court shall seem needful on the Fees and Dues hereby authorized to be taken, or to frame a new Table or Tables of Fees and Dues that shall be allowed to be taken for Matters done in contested Causes raised under the Authority of this Act, in place of the Fees and Dues herein-before specified; and when any such Alterations or any such new Table shall be made, all the Provisions herein contained relative to the Fees specified in Section Eighteen hereof shall be applicable to such altered Fees or Dues, or such new Table of Fees and Dues; and the said Court shall have like Powers to regulate the Fees payable in Appeals under this Act in the Court of Session.

Interpretation of Terms.

XXI. In all Cases in this Act, or in the Schedules hereto annexed, the Word "Sheriff" shall be held to include Sheriff Depute and Steward Depute and Sheriff Substitute and Steward Substitute; the Words "Sheriff Substitute" to include Steward Substitute; the Words "Sheriff Court" to include and apply to the Court of the Sheriff or Steward or their Substitutes; the Words "Sheriff Clerk" to include Steward Clerk and Depute Sheriff Clerk and Depute Steward Clerk; the Word "Shire" or "County' to include Stewartry; the Word "Sheriffdom" to include and be included in the Words "Shire, County, or Stewartry;" the Word "Person" to extend to a Partnership, Body Politic, Corporate, or Collegiate, as well as an Individual; the Word "Procurator" to include a Writer to the Signet or Solicitor before the Supreme Courts entitled to act as Agent under the Provisions of the Fourth Section of this Act: Provided always, that those Words and Expressions occurring in this Clause to which more than One Meaning is attached shall not have the different Meanings given to them by this Clause in those Cases in which there is any-

thing in the Subject or Context repugnant to such Construction.

Act not to affect recited Acts.

XXII. Nothing contained in this Act shall in any way affect the Provisions of the recited Acts or either of them in regard to any Proceedings which before the passing of this Act might competently take place under them.

As to Payment of Stamp Duty upon Indentures of Apprenticeship to Procurators.

XXIII. Whereas by Section Thirty-four of an Act passed in the Twenty-fourth and Twenty-fifth Years of Her Majesty's Reign, chapter Ninety-one, it is provided that no Deed or Instrument liable to Stamp Duty shall be registered unless the same is duly stamped: And whereas by Section Nine of an Act passed in the Twenty-eighth and Twenty-ninth Years of Her Majesty's reign, Chapter Eighty-five, it is provided that every Indenture entered into after the passing of the said Act with the Intention of qualifying an Apprentice for Admission as a Procurator as therein mentioned shall be recorded in the Register of Probative Writs of the County where the same shall have been entered into within Six Months from the Date fixed for the Commencement of the Term of Apprenticeship: And whereas such an Indenture as is referred to in the last-mentioned Act is liable to a Stamp Duty of Thirty Pounds, and it is considered that the Payment of so large a Sum at the Time of the Commencement of the Apprenticeship operates harshly and prejudicially: Be it enacted, That the Sum of Two Shillings and Sixpence, in part of the said Stamp Duty of Thirty Pounds, shall be paid upon the Execution of any such Indenture of Apprenticeship, and that the same Indenture, if bearing a Stamp Duty of Two Shillings and Sixpence, shall be deemed to be duly stamped for the Purpose of the recording thereof in the proper Register of Probative Writs, and also for the Purpose of enforcing all the Obligations therein contained, and that the Sum of Twenty-nine Pounds Seventeen Shillings and Sixpence, being the Residue of the said Stamp Duty of Thirty Pounds, shall be paid upon the Admission of the Apprentice as a Procurator in addition to the Stamp Duty payable in respect of such Admission.

SCHEDULE (A.)

No.	Date of Complaint.	Pursuers.	Defenders.	Nature and Amount.	How Cited.	By what Officer.	Interlocutors.	Date of Appeal.	Final Decree.

SCHEDULE (B.)

TRANSMISSION BOOK TO BE KEPT BY SHERIFF CLERKS.

Names of Cause. [A *versus* B.]	Date of Transmission to Sheriff Substitute.	If Proof led, state whether before Sheriff, or Substitute, or Commissioner, and its Duration.	Date of Case being returned advised.	Date of Transmission to Sheriff.	Date of Case being returned advised.	Date of intimation of Sheriff's Judgment.	Date of Transmission to Court of Session.	Date of Case being returned from Court of Session advised or Appeal fallen from.	Remarks.*

Note.—Where Cases have been longer than Six Days unadvised after Transmission to the Sheriff, the Reason to be stated in this Column.
Also the names of any Commissioners to whom Remits have been made to take Proofs.
Also whether Proof taken by Sheriff's or Commissioner's own Hand, or by being dictated to a Clerk or a Shorthand Writer.

XCVII.

An Act to facilitate the Administration of Trusts in Scotland. [12th August 1867.]

WHEREAS by the Acts Twenty-fourth and Twenty-fifth *Victoria*, Chapter Eighty-four, and Twenty-sixth and Twenty-seventh *Victoria*, Chapter One hundred and fifteen, certain Powers are conferred on gratuitous Trustees in *Scotland*, and it is expedient that greater Facilities should be given for the Administration of Trust Estates in *Scotland*:

Be it enacted, by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Definition of Trusts and Trust Deeds.

I. In the construction of this Act and of the said recited Acts the Words "Trusts and Trust Deeds" shall be held to mean and include all Trusts constituted by virtue of any Deed or by private or local Act of Parliament; and the Words "gratuitous Trustees" in the Sense of this Act and of the said recited Acts shall mean and include all Trustees who are not entitled as such to Remuneration for their Services in addition to any Benefit they may be entitled to under the Trust, or who hold the office *ex officio*, and shall extend to and include all Trustees, whether original or assumed, who are entitled to receive any Legacy or Annuity or Bequest under the Trust: Provided always, that no Trustee to whom any Legacy or Bequest or Annuity is expressly given on condition of the Recipient thereof accepting the Office of Trustee under the Trust shall be entitled to resign the Office of Trustee by virtue of this or of the said recited Acts, unless otherwise expressly declared in the Trust Deed.

General Powers of Trustees.

II. In all such Trusts the Trustees shall have Power to do the following Acts, where such Acts are not at variance with the Terms or Purposes of the Trust, and such Acts when done shall be as effectual as if such powers had been contained in the Trust Deed, viz.:

1. To appoint Factors and Law Agents, and to pay them a suitable Remuneration:
2. To discharge Trustees who have resigned, and the Representatives of Trustees who have died:
3. To grant Leases of the Heritable Estate of a Duration not exceeding Twenty-one Years for Agricultural Lands, and Thirty-one Years for Minerals, and to remove Tenants:

4. To uplift, discharge, or assign Debts due to the Trust Estate:
5. To compromise or to submit, and refer all Claims connected with the Trust Estate:
6. To grant all Deeds necessary for carrying into effect the Powers vested in the Trustees:
7. To pay Debts due by the Truster or by the Trust Estate without requiring the Creditors to constitute such Debts where the Trustees are satisfied that the Debts are proper Debts of the Trust.

Powers which may be granted to Trustees by the Court.

III. It shall be competent to the Court of Session, on the Petition of the Trustees under any Trust Deed, to grant Authority to the Trustees to do any of the following Acts, on being satisfied that the same is expedient for the Execution of the Trust, and not inconsistent with the Intention thereof; and the Court shall determine all Questions of Expenses in relation to such Applications, and where it shall be of opinion that the Expense of any such Application should not be charged against the Trust Estate, it shall so find in disposing of the Application:

1. To sell the Trust Estate or any Part of it:
2. To grant Feus or Long Leases of the Heritable Estate or any Part of it:
3. To borrow Money on the Security of the Trust Estate or any Part of it:
4. To excamb any Part of the Trust Estate which is heritable:

Provided always, that when all the Beneficiaries under the Trust in existence at the Date of presenting such Petition are of full Age and capable of acting, it shall be in their Power, by Deed of Consent, to grant Authority to the Trustees to do any of the said Acts, the same not being inconsistent with the Intention of the Trust; and such Authority being obtained, the said Acts, when done, shall be equally valid and effectual as if the Authority of the Court for the Execution of the same had previously been obtained.

Extension of Powers of Trustees for Sale.

IV. All Powers of Sale conferred on Trustees by the Trust Deed, or by Virtue of this Act, may be exercised either by public Roup or private Bargain, unless otherwise directed in the Trust Deed or in the Authority given by the Court, or in the Deed of Consent to be granted by the Beneficiaries; and when the Estate is heritable, it shall be lawful in such Sales to sell, subject to or under Reservation of a Feu Duty or Ground Annual, at such Rate and on such conditions as may be agreed upon; and in all Sales and Feus it shall be lawful to reserve the Mines and Minerals if so wished.

Powers of Trustees under Trust Deeds with respect to Investments.

V. Trustees under any Trust Deed may, unless the contrary be expressly provided in such Trust Deed, invest the Trust Funds in the Purchase of any of the Government Stocks, Public Funds, or Securities of the United Kingdom, or Stock of the Bank of *England*, or may lend the Trust Funds on the security of any of the aforesaid Stocks or Funds or on the security of Heritable Property in *Scotland*, and may from Time to Time at their discretion vary any such Investment or Loan: Provided, that the Trustees shall not be held to be subject as Defendants or Respondents to the Jurisdiction of any of Her Majesty's Superior Courts of Law or Equity in *England* or *Ireland*, either as Trustees or personally, by reason of their having invested or lent Trust Funds as aforesaid.

Powers of Investment in Trust Deeds not to be restricted.

VI. The Powers of Investment conferred by this Act shall not be held or construed as restricting or controlling any Powers of Investment of Trust Funds expressly contained in any Trust Deed.

The Court may authorize the Advance of Part of the Capital of a Trust Fund.

VII. The Court may from Time to Time, under such Conditions as they see fit, authorize Trustees to advance any Part of the Capital of a Fund destined, either absolutely or contingently, to Minor Descendants of the Truster, being Beneficiaries having a vested interest in such Fund, if it shall appear that the Income of the Fund is insufficient or not applicable to, and that such Advance is necessary for, the Maintenance or Education of such Beneficiaries, or any of them, and that it is not expressly prohibited by the Trust Deed, and that the Rights of Parties other than the Heirs or Representatives of such Minor Beneficiaries shall not be thereby prejudiced.

Application of Trust Funds.

VIII. The Court may, on Petition by the Trustees, and after such Intimation and Inquiry as may be thought necessary, authorize the Trustees under any Trust Deed to apply the whole or any Part of Trust Funds which they are empowered or directed by the Trust Deed to invest in the Purchase of Heritable Property, to the Payment or Redemption of any Debt or Burden affecting Heritable Property which may be destined to the same Series of Heirs, and subject to the same Conditions as are by the Trust Deed made applicable to the Heritable Property directed to be Purchased; provided always, that such Application shall not be inconsistent with the other Provisions of the Trust Deeds.

Discharge of Trustees resigning and Heirs of Trustees dying during the

IX. When a Trustee who resigns, or the Representatives of a Trustee who has died or resigned, cannot obtain a discharge of his Acts and Intromissions from the remaining Trustees, and when the Beneficiaries of the Trust refuse, or are unable, from Absence, Incapacity, or otherwise, to

Subsistence of the Trust.

grant a discharge, the Court may, on Petition to that Effect, at the Instance of such Trustee or Representative, and after such Intimation and Inquiry as may be thought necessary, grant such Discharge, and it shall be in the Power of the Court to direct that the Expense of such Application be paid out of the Trust Estate, if the Court shall consider this reasonable.

Form of Resignation of Trustees.

X. Any Trustee entitled to resign his Office may do so by Minute of the Trust entered in the Sederunt Book of the Trust, and Signed in such Sederunt Book by such Trustee and by the other Trustee or Trustees acting at the Time, or he may do so by signing a Minute of Resignation in the Form of the Schedule (A.) to this Act annexed, or to the like Effect, and may register the same in the Books of Council and Session, and in such case he shall be bound to intimate the same to his Co-Trustee or Trustees, and the Resignation shall be held to take effect from and after the Expiry of One Calendar Month after the Date of such Intimation, or the last Date thereof if more than One, if the Trustee or Trustees to whom such Intimation was given is within *Scotland*, or otherwise within Three Months from and after that Date; and in case after Inquiry the Residence of any Trustee to whom Intimation should be given under this Provision cannot be found, such Intimation shall be given edictally in usual Form, and the Resignation in that Case shall be held to take effect from and after the Expiry of Six Months: and if any Trustee entitled to resign his Office is at the Time sole Trustee, he shall not be entitled to resign until, with the consent of the Beneficiaries under the Trust of full Age and capable of acting at the Time, he shall have assumed new Trustees, who shall have declared their Acceptance of Office, or he may apply to the Court stating his Wish to resign, and praying for the Appointment of new Trustees or of a Judicial Factor to administer the Trust, and the Court after Intimation to the Beneficiaries under the Trust, or such of them as the Court may direct, shall thereafter either appoint a Judicial Factor, or on the application of the Beneficiaries or any of them, may appoint Trustees in the same Manner as is provided under the Twelfth Section of this Act; and after such Appointment either of Judicial Factor or of Trustees the petitioning Trustee will be entitled to resign; and any retiring Trustee or Trustees who may have already retired shall be bound, when required, and at the Expense of the Trust, to execute all Deeds necessary for divesting them of Trust Property, conveying the same to the Trustees or Trustee or Judicial Factor acting in the Execution of the Trust.

Appointment of new or additional Trustees by Deed of Assumption.

XI. When Trustees have the Power of assuming new Trustees, such new Trustees may be assumed by a deed of Assumption executed by the Trustee or Trustees acting under such Trust Deed, or by a Quorum of such Trustees, if more than Two, in the Form of the Schedule (B.) to this Act annexed, or to the like Effect; and a Deed of Assumption so executed, in addition to a general Conveyance of the Trust Estate, may contain a special Conveyance of Heritable Property, and in such case may, with the necessary Warrant of Registration thereon, be recorded in the Register of Sasines, and when so recorded shall be effectual as a Conveyance of the Heritable Property belonging to the Trust Estate, so far as specially conveyed, in favour of the existing Trustees and the Trustees so to be assumed; and such Deed of Assumption shall also be effectual as an Assignation in favour of such existing and assumed Trustees of the whole Personal Property belonging to the Trust Estate: and in the event of any Trustee acting under any Trust Deed being insane, or incapable of acting by reason of physical or mental Disability, or by continuous Absence from the United Kingdom for a Period of Six Calendar Months or upwards, such Deed of Assumption may be executed by the remaining Trustee or Trustees acting under such Trust Deed: provided that when the Signatures of a Quorum of Trustees cannot be obtained it shall be necessary to obtain the Consent of the Court to such Deed of Assumption on Application either by the Acting Trustee or Trustees, or by any One or more of the Beneficiaries under the Trust Deed.

Appointment of new Trustees by the Court.

XII. When Trustees cannot be assumed under any Trust Deed, or when any Person who is the sole Trustee acting under any such Trust Deed has become insane, or incapable of acting by reason of physical or mental Disability, the Court may, upon the Application of any Party having Interest in the Trust Estate, after such Intimation and Inquiry as may be thought necessary, appoint a Trustee or Trustees under such Trust Deed, with all the Powers incident to that Office; and on such Appointment being made, in the Case of any Person becoming insane or incapable of acting as aforesaid, such Person shall cease to be a Trustee under such Trust Deed; and the Court may on such Application grant a Warrant to complete a Title to any Heritable Property forming Part of the Trust Estate in favour of the Trustee or Trustees so appointed, which Warrant shall specify and describe the Heritable Property to which it is applicable, and shall also specify the Moveable or Personal Property, or bear Reference to an Inventory appended to the Petition to the Court in which such

Moveable or Personal Property is specified; and such Warrant shall be effectual as a Conveyance of such Heritable Property in favour of the Trustee or Trustees so appointed, in like Manner and to the same Effect as a Warrant in favour of a Judicial Factor granted under the Authority of the Thirty-eighth Section of "The Titles to Land (*Scotland*) Act, 1860," and shall also be effectual as an Assignation of such Moveable or Personal Property in favour of the Trustee or Trustees so appointed.

Powers of Trustees appointed by the Court.

XIII. Trustees appointed by the Court shall not have the Power of assuming new Trustees, unless such Power is expressly conferred upon them by the Court.

Completion of Title by the Beneficiary of a lapsed Trust.

XIV. When any Person shall be entitled to the Possession for his own absolute Use of any Heritable Property or Moveable or Personal Property the Title to which has been taken in the Name of any Trustee, or Curator bonis, or Factor *loco absentis*, or Factor *loco tutoris*, or Judicial Factor, or other Person who has died or become incapable of acting without having executed a Conveyance of such Property, it shall be lawful for the Person beneficially entitled to such Property to apply by Petition to the Court for Authority to complete a Title to such Property in his own Name, and such Petition shall specify and describe the Heritable Property, and refer to an Inventory in which the Moveable or Personal Property is specified, to which such Title is to be completed, and after such Intimation and Inquiry as may be thought necessary it shall be lawful for the Court to grant a Warrant for completing such Title as aforesaid, which Warrant shall specify and describe the Heritable Property to which it is applicable, and shall also specify the Moveable or Personal Property, or shall bear reference to an Inventory appended to the Petition in which such Personal Property is specified; and such Warrant shall be effectual as a Conveyance of such Heritable Property in favour of the Petitioner in like Manner and to the same Effect as a Warrant in favour of a Judicial Factor granted under the Authority of the Thirty-eighth Section of "The Titles to Land (*Scotland*) Act, 1860," and shall also be effectual as an Assignation of such Moveable or Personal Property in favour of the Petitioner.

Completion of Title of Judicial Factor.

XV. Applications for Authority to complete the Title of a Judicial Factor to any Trust Property or Estate under the Thirty-eighth Section of "The Titles to Land (*Scotland*) Act, 1860," may be contained in the Petition for the Appointment of such Factor, and such Application may include Moveable or Personal Property; and the Warrant to be granted in pursuance thereof shall, in so far as regards Heritable Property, be effectual as a Conveyance in man-

ner specified in the said Act and in the preceding Section of this Act.

Powers of the Court under this Act to be exercised by the Lord Ordinary.

XVI. Applications to the Court under the Authority of this Act shall be by Petition addressed to the Court, and shall be brought in the first instance before One of the Lords Ordinary officiating in the Outer House, who may direct such Intimation and Service thereof and such Investigation or Inquiry as he may think fit, and the Power of the Lord Ordinary before whom the petition is enrolled may be exercised by the Lord Ordinary on the Bills during Vacation, and all such Petitions shall as respects Procedure, Disposal, and Review be subject to the same Rules and Regulations as are enacted with respect to Petitions coming before the Junior Lord Ordinary in virtue of the Act Twentieth and Twenty-first *Victoria*, Chapter Fifty-six: Provided that when in the Exercise of the Powers pertaining to the Court of appointing Trustees and regulating Trusts it shall be necessary to settle a Scheme for the Administration of any charitable or other permanent Endowment, the Lord Ordinary shall after preparing such Schemes report to one of the Divisions of the Court, by whom the same shall be finally adjusted and settled; and in all Cases where it shall be necessary to settle any such Scheme, Intimation shall be made to Her Majesty's Advocate, who shall be entitled to appear and intervene for the Interests of the Charity or any Object of the Trust or the public Interest.

Court may pass Acts of Sederunt.

XVII. The Court shall be and is hereby empowered from Time to Time from and after the passing of this Act to make such Regulations by Act or Acts of Sederunt as may be requisite for carrying into effect the Purposes of this Act: Provided that within Fourteen Days from the Commencement of every future Session of Parliament there shall be laid before both Houses of Parliament Copies of all Acts of Sederunt made and passed under the Powers of this Act.

Resignation of Trustee who is also Executor to infer Resignation as Executor.

XVIII. In all Cases where a Trust Deed appoints the Trustees to be also Executors, the Resignation of any such Trustee shall infer, unless where otherwise expressly declared, his Resignation also as an Executor under such Trust Deed.

Reservation of Powers in Trust Deeds and Questions under depending Actions.

XIX. Nothing in this Act contained shall be construed as innovating, revoking, or restricting any express Powers or Directions given to Trustees acting under any Trust Deed, or shall affect the Decision of any Question which may at the passing of this Act be the subject of a depending Action; and none of the Powers and Incidents by this Act conferred or annexed to the Office of Trustee shall

and Powers, &c. given by this Act, may be negatived by express Declaration.

take effect or be exercised if it is declared in the Trust Deeds that they shall not take effect; and when there is no such Declaration, then if any Variations or Limitations of any of the Powers or Incidents by the Act conferred or annexed are contained in such Trust Deed, such Powers or Incidents shall take effect or be exercised only subject to such Variations or Limitations.

Short Title.

XX. This Act may be cited for all Purposes as "The Trusts (*Scotland*) Act, 1867."

SCHEDULES.

SCHEDULE (A.)

Form of Minute of Resignation.

I *A.B.* do hereby resign as and from the Date hereof the Office of Trustee under the Trust Disposition and Settlement (*or other Deed*) granted by *C.D.* in favour of *E.F.*, *G.H.*, and myself, dated the Day of , and recorded in the Books of Council and Session (*or other Register*) the Day of . [*If the Trustee was assumed add,* and to which Office of Trustee I was assumed by Deed of Assumption granted by the said *E.F.* and *G.H.*, dated the Day of .] In witness whereof [*Testing Clause in the usual Form*].

SCHEDULE (B.)

Form of Deed of Assumption.

I *A.B.* [*or* we *A.B.* and *C.D.*], the accepting and surviving [*or* remaining] Trustee [*or* Trustees, *or* a Majority and Quorum of the accepting and surviving Trustees], acting under a Trust Disposition and Deed of Settlement (*or other Deed*) granted by *E.F.* in favour of , dated the Day of [*if recorded, specify Register and Date of recording*], do hereby assume *G.H.* [*or G.H.* and *I.K.*] as a Trustee [*or* Trustees] under the said Trust Disposition and Settlement (*or other Deed*); and I [*or* we] dispone and convey to myself [*or* ourselves] and the said

G.H. [*or G.H.* and *I.K.*] as Trustees under the said Trust Disposition and Settlement (*or other Deed*), and the Survivors or Survivor, and the Heirs of the last Survivor, the Majority, while more than Two are acting, being a Quorum, all and sundry the whole Trust Estate and Effects, Heritable and Moveable, Real and Personal, of every Description, or wherever situated, at present belonging to or under my (*or* our) Control as Trustees (*or* surviving Trustees, *or otherwise, as the Case may be,*) under the said Trust Disposition and Settlement, together with the whole Vouchers, Titles, and Instructions thereof. (*Then may follow, if wished, special Conveyances of Heritable or Personal Property with the usual Clauses of a Conveyance applicable to such Property, and as the Case may require.*) And we consent to Registration hereof for Preservation, and also in the General or Particular [*or* Burgh] Register of Sasines for Publication. In witness whereof [*Testing Clause in the usual Form*].

CAP. CXXIV.

An Act to amend The Merchant Shipping Act, 1854.
[20th August 1867.]

I. (Act may be cited as The Merchant Shipping Act, 1867, and shall be construed with and as Part of The Merchant Shipping Act, 1854.)

II. (Act to come into operation on 1*st January* 1868, but shall not apply to any Ship which belongs to the United Kingdom and is absent therefrom at the time, until such Ship has returned to the United Kingdom.)

III. (Sections 224, 227, and 231 of 17 and 18 Vict. c. 104 repealed.)

IV. Lime or Lemon Juice and other Anti-scorbutics to be provided and kept on board certain Ships.)

V. (Penalty for selling, &c., Medicines, &c., of bad Quality.)

VII. (Seaman's Expenses in Case of Illness through Neglect of Owner or Master to be paid by them.)

VIII. (Forfeiture of Wages, &c., of Seaman when Illness caused by his own default.)

IX. (Place appropriated to Seamen to have a certain Space for each Man, and to be properly constructed and kept clear.)

X. (Rules for Medical Inspection of Seamen.)

XI. (Offences by British Subjects on board Ships.)

CAP. CXXVI.

An Act to amend the Law relating to Railway Companies in Scotland. [20*th* August 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

Short Title.

I. This Act may be cited as The Railway Companies (*Scotland*) Act, 1867.

Extent of Act.

II. Except as in this Act expressly otherwise provided, this Act shall extend to *Scotland* only.

Interpretation of Terms.

III. In this Act—The Term "Company" means a Railway Company, that is to say, a Company constituted by Act of Parliament, or by Certificate under Act of Parliament, for the Purpose of constructing, maintaining, or working a Railway (either alone or in conjunction with any other Purpose): The Term "Decree" includes Decree of Court (whether in absence or *in foro contradictorio*) and Decree of Registration (whether on Deeds containing a Clause of Registration or on registered Protests of Promissory Notes or Bills of Exchange): The Term "Share" includes Stock: The Term "Person" includes Corporation: The Terms "Court of Session" and "Court" shall mean either Division of the Court of Session, or in Time of Vacation the Lord Ordinary officiating on the Bills.

Protection of Rolling Stock and Plant.

Restriction on Diligence against Moveable Property of Company;

IV. The Engines, Tenders, Carriages, Trucks, Machinery, Tools, Fittings, Materials, and Effects constituting the Rolling Stock and Plant used or provided by a Company for the Purposes of the Traffic on their Railway, or of their Stations or Workshops, shall not, after their Railway or any Part thereof is open for Public Traffic, be liable to be attached by Diligence at any Time after the passing of this Act and before the First Day of *September* One thousand eight hundred and sixty-eight where the Decree on which Diligence proceeds is obtained in an Action on a Contract entered into after the passing of this Act, or in an Action *not* on a Contract commenced after the passing of this Act, or on a protested Promissory Note or Bill of Exchange, or a Deed containing a Clause of Registration registered after the passing of this Act; but the Person who has obtained any such Decree may obtain the Ap-

but the Person who

pointment of a Judicial Factor on the Undertaking of the Company, on Application by Petition in a summary Way to the Court, and all Money received by such Judicial Factor shall, after due Provision for the Working Expenses of the Railway and other proper Outgoings in respect of the Undertaking, be applied and distributed, under the Direction of the Court, in Payment of the Debts of the Company, and otherwise according to the Rights and Priorities of the Persons for the Time being interested therein, and on Payment of the Amount due to every such Person who has obtained Decree as aforesaid the Court may, if it think fit, discharge such Judicial Factor.

has obtained Decree may obtain Appointment of a Judicial Factor.

V. If in any Case where Property of a Company has been attached by Diligence a Question arises whether or not it is liable to be so attached notwithstanding this Act, the same may be heard and determined on an Application by either Party by Petition in a summary Way to the Court, and such Determination shall be final and binding.

Determination of Questions respecting Diligence.

Arrangements.

VI. Where a Company are unable to meet their Engagements with their Creditors the Directors may prepare a Scheme of Arrangement between the Company and their Creditors (with or without Provisions for settling and defining any Rights of Shareholders of the Company as among themselves, and for raising, if necessary, additional Share and Loan Capital, or either of them), and may present a Petition to the Court for the Approval and Confirmation thereof, and shall along therewith lodge a Declaration in Writing under the Common Seal of the Company to the Effect that the Company are unable to meet their Engagements with their Creditors, and with an Affidavit of the Truth of such Declaration made by the Chairman of the Board of Directors and by the other Directors, or the major Part in Number of them, to the best of their respective Judgment and Belief.

Preparation and lodging of Scheme of Arrangement.

VII. After the Application shall have been made for the Approval of the Scheme, the Court may, on Motion by the Company in such Application, sist or interdict any Action or other Proceedings against the Company on such Terms as the Court thinks fit.

Stay of Actions.

VIII. Notice of the Application to the Court for the Confirmation of the Scheme shall be published in the *Edinburgh Gazette*.

Notice in Edinburgh Gazette.

IX. After such Publication of Notice no Diligence against the Property of the Company shall be available without Leave of the Court, to be obtained on Petition in a summary Way.

Stay of Diligence, &c.

Assent by Debenture Holders, &c.

X. The Scheme shall be deemed to be assented to by the Holders of Mortgages, Debentures, or Bonds issued under the Authority of the Company's Special Acts when it is assented to in Writing by Three Fourths in Value of the Holders of such Mortgages, Debentures, or Bonds, and shall be deemed to be assented to by the Holders of Debenture Stock of the Company when it is assented to in Writing by Three Fourths in Value of the Holders of such Stock.

Assent by Persons in right of annual Payment, &c.

XI. Where any annual Payment is charged on the Receipts of or is payable by the Company in consideration of the purchase of the Undertaking of another Company, the Scheme shall be deemed to be assented to by the Persons in right of annual Payment when it is assented to in Writing by Three Fourths in Value of such Persons.

Assent by Preference Shareholders.

XII. The Scheme shall be deemed to be assented to by the Guaranteed or Preference Shareholders of the Company when it is assented to in Writing as follows:—If there is only One Class of Guaranteed or Preference Shareholders, then by Three Fourths in Value of that Class; and if there are more Classes of Guaranteed or Preference Shareholders than One, then by Three Fourths in Value of each such Class.

Assent by Ordinary Shareholders.

XIII. The Scheme shall be deemed to be assented to by the Ordinary Shareholders of the Company when it is assented to at an Extraordinary General Meeting of the Company specially called for that Purpose.

Assent by Leasing Company.

XIV. Where the Company are Lessees of a Railway the Scheme shall be deemed to be assented to by the Leasing Company when it is assented to as follows: In Writing by Three Fourths in Value of the Holders of Mortgages, Bonds, and Debenture Stock of the Leasing Company: If there is only One Class of Guaranteed or Preference Shareholders of the Leasing Company, then in Writing by Three Fourths in Value of that Class; and if there are more Classes of Guaranteed or Preference Shareholders in the Leasing Company than One, then in Writing by Three Fourths in Value of each such Class: By the Ordinary Shareholders of the Leasing Company at an Extraordinary General Meeting of that Company specially called for that Purpose.

Assent of Creditors, &c. not affected, unnecessary.

XV. Provided that the Assent to the Scheme of any Class of Holders of Mortgages, Debentures, Bonds, or Debenture Stock, or of any Class of Persons in right of annual Payment as aforesaid, or of any Class of Guaranteed or Preference Shareholders, or the Assent of a Leasing Company, shall not be requisite in case the Scheme

does not prejudicially affect any Right or Interest of such Class or Company.

Application for Confirmation of Scheme.

XVI. If at any Time within Three Months after presenting a Petition to the Court for the Confirmation of the Scheme, or within such extended Time as the Court from Time to Time thinks fit to allow, the Directors of the Company consider the Scheme to be assented to as by this Act required, they may move the Court for Confirmation of the Scheme.

Notice of any such Application, when intended, shall be published in the *Edinburgh Gazette*.

Confirmation of Scheme.

XVII. After hearing the Directors, and any Creditors, Shareholders, or other Parties whom the Court thinks entitled to be heard on the Application, the Court, if satisfied that the Scheme has been, within Three Months after the Presentation of the Petition for Confirmation thereof, or within such extended Time (if any) as the Court has allowed, assented to as required by this Act, and that no sufficient Objection to the Scheme has been established, may confirm the Scheme, and decern accordingly.

Scheme, when confirmed, to be final, binding, and effectual.

XVIII. The Scheme, when confirmed, shall be extracted, and thenceforth the same shall be final and binding and effectual to all Intents, and the Provisions thereof shall, against and in favour of the Company and all Parties assenting thereto or bound thereby, have the like Effect as if they had been enacted by Parliament.

Notice of Confirmation of Scheme.

XIX. Notice of the Decree of Confirmation of the Scheme shall be published in the *Edinburgh Gazette*.

Company to keep printed Copies of Scheme, for Sale.

XX. The Company shall at all Times keep at their principal Office printed Copies of the Scheme, when confirmed, and shall sell such Copies to all Persons desiring to buy the same at a reasonable Price, not exceeding Sixpence for each Copy.

Penalty on Neglect.

If the Company fail to comply with this Provision they shall be liable to a Penalty not exceeding Twenty Pounds, and to a further Penalty not exceeding Five Pounds for every Day during which such Failure continues after the First Penalty is incurred, which Penalties shall be recovered and applied as Penalties under The Railways Clauses Consolidation (*Scotland*) Act, 1845, are recoverable and applicable.

Provision for Cases where Railways or Part in England.

XXI. Where a Company whose principal Office is situate in *Scotland* have a Railway or Part of a Railway in *England* the following Provisions shall have Effect: (1.) Any Petition for the Approval and Confirmation of a Scheme under this Act shall be presented to the Court of Session: (2.) Where, after the presenting of any such Petition, any Person who is not amenable to the Jurisdiction of the

Court of Session brings any Action or institutes any other Proceeding against the Company in *England*, the Court of Chancery may, on the Application of the Company on Summons or Motion, in a summary Way restrain the same on such Terms as the Court thinks fit: (3.) Notice of the presenting of the Petition shall be published in the *London Gazette*, and after such Publication no Execution, Attachment, or other Process against the Property of the Company in *England* shall be available for any Person who is not amenable to the Jurisdiction of the Court of Session without the Leave of the Court of Chancery, to be obtained on Summons or Motion in a summary Way.

Acts of Sederunt to be made.

XXII. The Court of Session may from Time to Time make Acts of Sederunt for the Regulation of the Practice of the Court under this Act.

Loan Capital.

Priority of Mortgages.

XXIII. All Money borrowed or to be borrowed by a Company on Mortgage, Debenture, or Bond, or Debenture Stock, under the Provisions of any Act authorizing the borrowing thereof, shall have Priority against the Company and the Property from Time to Time of the Company over all other Claims on account of any Debts incurred or Engagements entered into by them after the passing of this Act: Provided always, that this Priority shall not affect any Claim, Right, or Remedy against the Company in respect of any Rentcharge, annual Feu-duty, or Ground Annual granted or to be granted by them in pursuance of the Lands Clauses Consolidation (*Scotland*) Act, 1845, or the Lands Clauses Consolidation Acts Amendment Act, 1860, or in respect of any Rent or Sum reserved by or payable under any Lease granted or made to the Company by any Person in pursuance of any Act relating to the Company which is entitled to rank in Priority to, or *pari passu* with, the Interest or Dividends on the Mortgages, Debentures, Bonds, and Debenture Stock; nor shall anything herein-before contained affect any Claim for Land taken, used, or occupied by the Company for the Purposes of the Railway, or injuriously affected by the Construction thereof, or by the Exercise of any Powers conferred on the Company.

Power to issue Debenture Stock, subject to Part III. of 26 & 27 Vict. c. 118.

XXIV. Any Company may create and issue Debenture Stock, subject to the Provisions of Part III. of The Companies Clauses Act, 1863 (relating to Debenture Stock); and the said Part III. shall, with respect to any Special Act of a Company incorporating that Part, whether passed or to be passed, be read and have Effect as if the following Words, that is to say, "not exceeding the Rate prescribed "in the Special Act, and if no Rate is prescribed, then not

"exceeding the Rate of Four Pounds *per Centum per* "*Annum*," had not been inserted in Section Twenty-two of that Act; and for the Purposes of the present Section this Act shall be deemed a Special Act passed incorporating that Part, and any Special Act of a Company passed before the passing of this Act prescribing any Rate shall be read and have Effect as if no Rate had been prescribed therein.

Restriction on Rate of Interest on Debenture Stock already authorized.

XXV. Provided that any Debenture Stock the Creation whereof has been authorized by a Company, but which has not been issued, before the passing of this Act, shall not be issued on any Terms other than those whereon it might have been issued if this Act had not been passed, unless and until the Issue thereof on Terms other than as aforesaid is after the passing of this Act authorized by the Company in manner provided in Section Twenty-two of The Companies Clanses Act 1863.

Advances to meet Debentures falling due.

XXVI. Money borrowed by a Company for the Purpose of paying off, and duly applied in paying off, Bonds, Debentures, or Mortgages of the Company given or made under the statutory Powers of the Company, shall, so far as the same is so applied, be deemed Money borrowed within and not in excess of such statutory Powers.

Share Capital.

Power to issue Shares or Stock at Discount.

XXVII. Section Twenty-one of The Companies Clauses Act, 1863, shall, with respect to any Special Act of a Company incorporating Part II. of that Act, whether passed or to be passed, be read and have Effect as if the following Words, that is to say, "but so that not less than the full "nominal Amount of any Share or Portion of Stock be "payable or paid in respect thereof," had not been inserted in that Section.

Power to issue Residue of original or other Capital at Discount.

XXVIII. Any Shares forming Part of the Capital (whether original or additional) authorized to be raised by any Special Act of a Company passed before the present Session which have not been disposed of may be disposed of in manner provided by Part II. of the Companies Clauses Act, 1863, as amended by this Act, and that Part, as so amended, shall be deemed incorporated with such Special Act accordingly.

Restriction on issuing at Discount of Shares or Stock already authorized.

XXIX. Provided that any Shares the Creation whereof has been authorized by a Company, but which have not been issued, before the passing of this Act, shall not be issued on any Terms other than those whereon the same might have been issued if this Act had not been passed, unless and until the Issue thereof on Terms other than as aforesaid is after the passing of this Act authorized by the

Company in manner provided by Part II. of The Companies Clauses Act, 1863.

As to Audit of Railway Accounts.

XXX. No Dividend shall be declared by a Company until the Auditors have certified that the half-yearly Accounts proposed to be issued contain a full and true Statement of the financial condition of the Company, and that the Dividend proposed to be declared on any Shares is *bonâ fide* due thereon after charging the Revenue of the Half Year with all Expenses which ought to be paid thereout in the Judgment of the Auditors; but if the Directors differ from the Judgment of the Auditors with respect to the Payment of any such Expenses out of the Income of the Half Year, such Difference shall, if the Directors desire it, be stated in the Report to the Shareholders, and the Company in General Meeting may decide thereon, subject to all the Provisions of the Law then existing, and such Decision shall for the Purposes of Dividend be final and binding; but if no such Difference is stated, or if no Decision is given on any such Difference, the Judgment of the Auditors shall be final and binding; and the Auditors may examine the Books of the Company at all reasonable Times, and may call for such further Accounts, and such Vouchers, Papers, and Information, as they think fit; and the Directors and Officers of the Company shall produce and give the same as far as they can, and the Auditors may refuse to certify as aforesaid until they have received the same; and the Auditors may at any Time add to their Certificate, or issue to the Shareholders independently, at the Cost of the Company, any Statement respecting the financial Condition and Prospects of the Company which they think material for the Information of the Shareholders.

Abandonment.

Provisions of 13 & 14 Vict. c. 83, as to Abandonment of Railways to apply to all Companies authorized to make Railways passed before present session.

XXXI. The Abandonment of Railways Act, 1859, shall extend and apply to all Companies authorized to make Railways by Act of Parliament passed before the present Session, subject and according to the following Provisions: (1.) Section Thirty-one of that Act shall be read and have Effect as if The Companies Act of 1862, were referred to therein instead of The Joint Stock Companies Winding-up Act, 1848, or any Act amending the same: (2.) Section Thirty-five of the said Act of 1858 shall be read and have Effect as if the Date of the Twenty-first Day of *May* One thousand eight hundred and sixty-seven were therein substituted for the Date of the Eleventh Day of *February* One thousand eight hundred and fifty: (3.) Nothing in the said Act of 1850 or this Act shall be deemed to make it obligatory on the Board of Trade to authorize the Abandonment

of a Railway or Part of a Railway on any Application in that Behalf, and the Board of Trade shall not authorize such Abandonment in any case, unless it appears to them just and expedient so to do; and the Board of Trade may, if they think fit, refuse in any case to authorize such Abandonment, except on Condition of the Money deposited as Security for the Completion of the Railway, or the Stocks, Funds, or Securities on which the same is invested, or the Money secured by any Bond conditioned for Completion of the Railway, or for Payment of Money in default thereof, being applied as Part of the Assets of the Company.

Abandonment where Three Fifths of Capital has not been subscribed.

XXXII. Where it is shown to the Satisfaction of the Board of Trade, with respect to a Company authorized to make a Railway by Act of Parliament passed before the present Session that no Part or a Part less than Three Fifths of the Share Capital of the Company has been subscribed, the Board of Trade may, if they think fit, proceed under the said Act of 1850, as extended by this Act, on the Application of any Person named in the Special Act incorporating the Company as a Member or Director thereof, or of any Person named in the Warrant or Order directing Payment of any Deposit under any Standing Order of either House of Parliament, or of any Person who has lent the Amount of such Deposit or any Part thereof, or has entered into any Bond for the Completion of the Railway, or for Payment of any Money in default thereof, and without the preliminary Consent of a Meeting of Shareholders of the Company.

Compensation for Damage to Land by Entry, &c.

XXXIII. The Authority given under this Act for the Abandonment by a Company of any Railway or Part of a Railway shall not affect the Right of the Owner or Occupier of any Lands that have been temporarily occupied by the Company to receive Compensation, in accordance with the Provisions of The Railways Clauses Consolidation (*Scotland*) Act, 1845, for such temporary Occupation, or for any Loss, Damage, or Injury that has been sustained by him by reason thereof, or of the Exercise as regards such Lands of any of the Company's Powers.

Cancellation of Bonds for Completion of Railways and Release of Deposit.

XXXIV. Where a Warrant for Abandonment is granted under the Abandonment of Railways Act, 1850, as extended by this Act, the Commissioners of Her Majesty's Treasury may cancel and deliver up any Bond entered into by or on behalf of a Railway Company for securing the Completion of a Railway, or, in case the Abandonment be of part of the Railway only, may cancel and deliver up such Bond on receiving another Bond in lieu thereof, conditioned for Payment of a due proportionate Part of the Amount secured by such former Bond; and any Money

remaining deposited as Security for the Completion of the Railway, or the Stocks, Funds, or Securities in which the same is invested, or any Bank Annuities, Stocks, Funds, Securities, or Exchequer Bills remaining deposited as such Security, or in case the Abandonment authorized is of Part only of a Railway, then such proportionate Part as the Board of Trade thinks fit of such Money, Stocks, Funds, Securities, Annuities, or Exchequer Bills, shall be paid, transferred, or delivered out to the Persons who would be entitled to receive the same if the Railway had been completed and opened for public Traffic; and the Court of Chancery or Court of Session, as the Case may be, shall, on the Application of those Persons, order Payment, Transfer, or Delivery out thereof accordingly, on a Certificate of the Board of Trade certifying that such a Warrant for Abandonment has been granted.

Protection for Board of Trade in case of Error.

XXXV. The issuing in any Case of any Warrant or Certificate relating to Deposit, or to any Money, Stocks, Funds, Securities, Bank Annuities, or Exchequer Bonds deposited, or any Error in any such Warrant or Certificate, or in relation thereto, shall not make the Board of Trade, or the Person signing the Warrant or Certificate on their behalf, in any Manner liable for or in respect of the Money, Stocks, Funds, Securities, Bank Annuities, or Exchequer Bills deposited, or the Interest of or Dividends on the same or any Part thereof respectively.

Purchase of Lands.

Amendment (as to Railway Companies) of Section 84 of 8 & 9 Vict. c. 19.

XXXVI. Where after the passing of this Act a Company exercise the Powers conferred on the Promoters of the Undertaking by Section Eighty-four of The Lands Clauses Consolidation (*Scotland*) Act, 1845, the following Provisions shall have Effect: (1.) The Valuator to be appointed as in that Section provided shall be appointed by the Board of Trade instead of by the Sheriff, and all the Provisions of that Act relative to a Valuator appointed by the Sheriff shall apply to a Valuator so appointed by the Board of Trade: (2.) The Company shall not give less than Seven Days Notice of their Intention to apply to the Board of Trade for the Appointment of a Valuator to any Party interested in and entitled to sell and convey the Lands in question, and not consenting to the Entry of the Company: (3.) The Valuation to be made by the Valuator so appointed shall include the Amount of Compensation for all Damage and Injury to be sustained by reason of the Exercise of the Powers conferred by the said Section, as far as such Damage and Injury are capable of Estimation: (4.) The Securities to the Bond to be given by the Company under that Section shall, in case the Parties dif-

fer, instead of being approved of by the Sheriff, be approved of by the Board of Trade, after hearing the Parties.

XXXVII. Where, under The Lands Clauses Consolidation (*Scotland*) Act, 1845, or any Act incorporating the same, a Question of disputed Compensation relating to Lands required to be purchased or taken by a Company is determined by Arbitration, the Costs of and incidental to the Arbitration and Award shall, if either Party so requires, be taxed, as between the Parties, by the Auditor of the Court of Session. Costs of Arbitration,

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CAP. CXXVII.

An Act to amend the Law relating to Railway Companies.
[20th August 1867.]

XXI. Where a Company whose principal Office is situate in *England* have a Railway or Part of a Railway in *Scotland* the following Provisions shall have Effect: Provision for Cases where Railways or Part in Scotland.

(1.) Any Scheme under this Act shall be filed in the Court of Chancery in *England*:

(2.) Where, after the filing of the Scheme, any Person who is not amenable to the Jurisdiction of the Court of Chancery in *England* brings any Action against the Company in *Scotland*, the Court of Session may, on the Application of the Company by Petition in a summary Way, sist, stay, or interdict the same on such Terms as the Court thinks fit:

(3.) Notice of the filing of the Scheme shall be published in the *Edinburgh Gazette*, and after such Publication no Diligence against the Property of the Company in *Scotland* shall be available for any Person who is not amenable to the Jurisdiction of the Court of Chancery in *England* without the Leave of the Court of Session, to be obtained on Petition in a summary Way:

In this Section the Term "Court of Session" means either Division of the Court of Session, or in Time of Vacation the Lord Ordinary officiating on the Bills.

CAP. CXXXI.

An Act to amend "The Companies Act, 1862,"
[20*th* August 1867.]

BE it enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

Preliminary.

Short Title.

I. This Act may be cited for all Purposes as "The Companies Act, 1867."

Act to be construed as One with 25 & 26 Vict. c. 89.

II. The Companies Act, 1862, is herein-after referred to as "the Principal Act;" and the Principal Act and this Act are herein-after distinguished as and may be cited for all Purposes as "The Companies Acts, 1862 and 1867;" and this Act shall, so far as is consistent with the Tenor thereof, be construed as One with the Principal Act; and the Expression "this Act" in the Principal Act, and any Expression referring to the Principal Act which occurs in any Act or other Document, shall be construed to mean the Principal Act as amended by this Act.

Commencement of Act.

III. This Act shall come into force on the First Day of September 1867, which Date is herein-after referred to as the Commencement of this Act.

Unlimited Liability of Directors.

Company may have Directors with unlimited Liability.

IV. Where after the Commencement of this Act a Company is formed as a Limited Company under the Principal Act, the Liability of the Directors or Managers of such Company, or the Managing Director, may, if so provided by the Memorandum of Association, be unlimited.

Liability of Director, past and present, where Liability is unlimited.

V. The following Modifications shall be made in the Thirty-eighth Section of the Principal Act, with respect to the Contributions to be required in the Event of the winding-up of a Limited Company under the Principal Act, from any Director or Manager whose Liability is, in pursuance of this Act, unlimited: (1.) Subject to the Provisions herein-after contained, any such Director or Manager, whether past or present, shall, in addition to his Liability (if any) to contribute as an ordinary Member, be liable to contribute as if he were at the Date of the Commencement of such Winding-up a Member of an unlimited Company: (2.) No contribution required from any past Director or Manager who has ceased to hold such Office for a Period of One Year or upwards prior to the Commencement of the

Winding-up shall exceed the Amount (if any) which he is liable to contribute as an Ordinary Member of the Company: (3). No Contribution required from any past Director or Manager in respect of any Debt or Liability of the Company contracted after the Time at which he ceased to hold such office shall exceed the Amount (if any) which he is liable to contribute as an ordinary Member of the Company: (4.) Subject to the Provisions contained in the Regulations of the Company no Contribution required from any Director or Manager shall exceed the Amount (if any) which he is liable to contribute as an ordinary Member, unless the Court deems it necessary to require such Contribution in order to satisfy the Debts and Liabilities of the Company, and the Costs, Charges, and Expenses of the Winding-up.

Director with unlimited Liability may have Set-off as under Sect. 101 of 25 & 26 Vict. c. 89.

VI. In the event of the winding-up of any Limited Company, the Court, if it think fit, may make to any Director or Manager of such Company whose Liability is unlimited the same Allowance by way of Set-off as under the One hundred and first Section of the Principal Act it may make to a Contributory where the Company is not limited.

Notice to be given to Director on his Election that his Liability will be unlimited.

VII. In any Limited Company in which, in pursuance of this Act, the Liability of a Director or Manager is unlimited, the Directors or Managers of the Company (if any), and the Member who proposes any Person for Election or Appointment to such Office, shall add to such Proposal a Statement that the Liability of the Person holding such Office will be unlimited, and the Promoters, Directors, Managers, and Secretary (if any) of such Company, or One of them, shall, before such Person accepts such Office or acts therein, give him Notice in Writing that his Liability will be unlimited. If any Director, Manager, or Proposer make default in adding such Statement, or if any Promoter, Director, Manager, or Secretary make default in giving such Notice, he shall be liable to a Penalty not exceeding One hundred Pounds, and shall also be liable for any Damage which the Person so elected or appointed may sustain from such Default, but the Liability of the Person elected or appointed shall not be affected by such Default.

Existing Limited Company may, by special Resolution, make Liability of Directors unlimited.

VIII. Any Limited Company under the Principal Act, whether formed before or after the Commencement of this Act, may, by a special Resolution, if authorized so to do by its Regulations, as originally framed or as altered by special Resolution, from Time to Time modify the Conditions contained in its Memorandum of Association so far as to render unlimited the Liability of its Directors or Managers, or of the Managing Director; and such special Resolution shall be of the same Validity as if it had been

originally contained in the Memorandum of Association, and a Copy thereof shall be embodied in or annexed to every Copy of the Memorandum of Association which is issued after the passing of the Resolution, and any Default in this respect shall be deemed to be a Default in complying with the Provisions of the Fifty-fourth Section of the Principal Act, and shall be punished accordingly.

Reduction of Capital and Shares.

Power to Company to reduce Capital.

IX. Any Company limited by Shares may, by special Resolution, so far modify the Conditions contained in its Memorandum of Association, if authorized so to do by its Regulations as originally framed or as altered by special Resolution, as to reduce its Capital; but no such Resolution for reducing the Capital of any Company shall come into operation until an Order of the Court is registered by the Registrar of Joint Stock Companies, as is herein-after mentioned.

Company to add "and Reduced" to its Name for a limited period.

X. The Company shall, after the Date of the passing of any special Resolution for reducing its Capital, add to its Name, until such Date as the Court may fix, the Words "and "Reduced," as the last Words in its Name, and those Words shall, until such Date, be deemed to be Part of the Name of the Company within the Meaning of the Principal Act.

Company to apply to the Court for an Order confirming Reduction.

XI. A Company which has passed a special Resolution for reducing its Capital, may apply to the Court by Petition for an Order confirming the Reduction, and on the Hearing of the Petition the Court, if satisfied that with respect to every Creditor of the Company who under the Provisions of this Act is entitled to object to the Reduction, either his Consent to the Reduction has been obtained, or his Debt or Claim has been discharged or has determined, or has been secured as herein-after provided, may make an Order confirming the Reduction on such Terms and subject to such Conditions as it deems fit.

Definition of the Court.

XII. The Expression "the Court" shall in this Act mean the Court which has Jurisdiction to make an Order for winding-up the petitioning Company, and the Eighty-first and Eighty-third Sections of the Principal Act shall be construed as if the Term "Winding-up" in those Sections included Proceedings under this Act, and the Court may in any Proceedings under this Act make such Order as to Costs as it deems fit.

Creditors may object to Reduction, and List of objecting Creditors

XIII. Where a Company proposes to reduce its Capital, every Creditor of the Company who at the Date fixed by the Court is entitled to any Debt or Claim which, if that Date were the Commencement of the winding-up of the Company, would be admissible in Proof against the Com-

pany, shall be entitled to object to the Proposed Reduction, and to be entered in the List of Creditors who are so entitled to object. The Court shall settle a List of such Creditors, and for that Purpose shall ascertain as far as possible without requiring an Application from any Creditor the Names of such Creditors and the Nature and Amount of their Debts or Claims, and may publish Notices fixing a certain Day or Days within which Creditors of the Company who are not entered on the List are to claim to be so entered or to be excluded from the Right of objecting to the Proposed Reduction.

to be settled by the Court.

XIV. Where a Creditor whose Name is entered on the List of Creditors, and whose Debt or Claim is not discharged or determined, does not consent to the proposed Reduction, the Court may (if it think fit) dispense with such Consent on the Company securing the Payment of the Debt or Claim of such Creditor by setting apart and appropriating in such Manner as the Court may direct, a Sum of such Amount as is herein-after mentioned; (that is to say,) (1.) If the full Amount of the Debt or Claim of the Creditor is admitted by the Company, or, though not admitted, is such as the Company are willing to set apart and appropriate, then the full Amount of the Debt or Claim shall be set apart and appropriated. (2.) If the full Amount of the Debt or Claim of the Creditor is not admitted by the Company, and is not such as the Company are willing to set apart and appropriate, or if the Amount is contingent or not ascertained, then the Court may, if it think fit, inquire into and adjudicate upon the Validity of such Debt or Claim, and the Amount for which the Company may be liable in respect thereof, in the same Manner as if the Company were being wound up by the Court, and the Amount fixed by the Court on such Inquiry and Adjudication shall be set apart and appropriated.

Court may dispense with Consent of Creditor on Security being given for his Debt.

XV. The Registrar of Joint Stock Companies upon the Production to him of an Order of the Court confirming the Reduction of the Capital of a Company, and the Delivery to him of a Copy of the Order and of a Minute (approved by the Court), showing with respect to the Capital of the Company, as altered by the Order, the Amount of such Capital, the Number of Shares in which it is to be divided, and the Amount of each Share, shall register the Order and Minute, and on the Registration the special Resolution confirmed by the Order so registered shall take effect. Notice of such Registration shall be published in such Manner as the Court may direct. The Registrar shall certify under his Hand the Registration of the Order and Minute, and his Certificate shall be conclusive Evidence

Order and Minute to be registered.

that all the Requisitions of this Act with respect to the Reduction of Capital have been complied with, and that the Capital of the Company is such as is stated in the Minute.

Minute to form Part of Memorandum of Association.

XVI. The Minute when registered shall be deemed to be substituted for the corresponding Part of the Memorandum of Association of the Company, and shall be of the same Validity and subject to the same Alterations as if it had been originally contained in the Memorandum of Association; and, subject as in this Act mentioned, no Member of the Company, whether past or present, shall be liable in respect of any Share to any Call or Contribution exceeding in Amount the Difference (if any) between the Amount which has been paid on such Share and the Amount of the Share as fixed by the Minute.

Saving of Rights of Creditors who are ignorant of Proceedings.

XVII. If any Creditor who is entitled in respect of any Debt or Claim to object to the Reduction of the Capital of a Company under this Act is, in consequence of his Ignorance of the Proceedings taken with a View to such Reduction, or of their Nature and Effect with respect to his Claim, not entered on the List of Creditors, and after such Reduction the Company is unable, within the Meaning of the Eightieth Section of the Principal Act, to pay to the Creditor the Amount of such Debt or Claim, every Person who was a Member of the Company at the Date of the Registration of the Order and Minute relating to the Reduction of the Capital of the Company, shall be liable to contribute for the Payment of such Debt or Claim an Amount not exceeding the Amount which he would have been liable to contribute if the Company had commenced to be wound up on the Day prior to such Registration, and on the Company being wound up, the Court on the Application of such Creditor, and on Proof that he was ignorant of the Proceedings taken with a view to the Reduction, or of their Nature and Effect with respect to his Claim, may, if it think fit, settle a List of such Contributions accordingly, and make and enforce Calls and Orders on the Contributories settled on such List in the same Manner in all respects as if they were ordinary Contributories in a winding-up; but the Provisions of this Section shall not affect the Rights of the Contributories of the Company among themselves.

Copy of registered Minute.

XVIII. A Minute when registered shall be embodied in every Copy of the Memorandum of Association issued after its Registration; and if any Company makes default in complying with the Provisions of this Section it shall incur a Penalty not exceeding One Pound for each Copy in respect of which such Default is made, and every Director

and Manager of the Company who shall knowingly and wilfully authorize or permit such Default shall incur the like Penalty.

Penalty on Concealment of Name of Creditor.

XIX. If any Director, Manager, or Officer of the Company wilfully conceals the Name of any Creditor of the Company who is entitled to object to the proposed Reduction, or wilfully misrepresents the Nature or Amount of the Debt or Claim of any Creditor of the Company, or if any Director or Manager of the Company aids or abets in or is privy to any such Concealment or Misrepresentation as aforesaid, every such Director, Manager, or Officer shall be guilty of a Misdemeanour.

Power to make Rules extended to making Rules concerning Matters in this Act.

XX. The Powers of making Rules concerning winding-up conferred by One hundred and seventieth, One hundred and seventy-first, One hundred and seventy-second, and One hundred and seventy-third Sections of the Principal Act shall respectively extend to making Rules concerning Matters in which Jurisdiction is by this Act given to the Court which has the Power of making an Order to wind up a Company, and until such Rules are made the Practice of the Court in Matters of the same Nature shall, so far as the same is applicable, be followed.

Subdivision of Shares.

Shares may be divided into Shares of smaller Amount.

XXI. Any Company limited by Shares may by special Resolution so far modify the Conditions contained in its Memorandum of Association, if authorized so to do by its Regulations as originally framed or as altered by special Resolution, as by Subdivision of its existing Shares or any of them, to divide its Capital, or any Part thereof, into Shares of smaller Amount than is fixed by its Memorandum of Association. Provided, that in the Subdivision of the existing Shares the Proportion between the Amount which is paid and the Amount (if any) which is unpaid on each Share of reduced Amount shall be the same as it was in the Case of the existing Share or Shares from which the Share of reduced Amount is derived.

Special Resolution to be embodied in Memorandum of Association.

XXII. The Statement of the Number and Amount of the Shares into which the Capital of the Company is divided contained in every Copy of the Memorandum of Association issued after the passing of any such special Resolution, shall be in accordance with such Resolution; and any Company which makes default in complying with the Provisions of this Section shall incur a Penalty not exceeding One Pound for each Copy in respect of which such Default is made; and every Director and Manager of the Company who knowingly or wilfully authorizes or permits such Default shall incur the like Penalty.

Associations not for Profit.

Special Provisions as to Associations formed for Purposes not of Gain.

XXIII. Where any Association is about to be formed under the Principal Act as a Limited Company, if it proves to the Board of Trade that it is formed for the Purpose of promoting Commerce, Art, Science, Religion, Charity, or any other useful Object, and that it is the Intention of such Association to apply the Profits, if any, or other Income of the Association, in promoting its Objects, and to Prohibit the Payment of any Dividend to the Members of the Association, the Board of Trade may by Licence, under the Hand of One of the Secretaries or Assistant Secretaries, direct such Association to be registered with Limited Liability, without the Addition of the Word Limited to its Name, and such Association may be registered accordingly, and upon Registration shall enjoy all the Privileges and be subject to the Obligations by this Act imposed on Limited Companies, with the Exceptions that none of the Provisions of this Act that require a Limited Company to use the Word Limited as any Part of its Name, or to publish its Name, or to send a List of its Members, Directors, or Managers to the Registrar, shall apply to an Association so registered. The Licence by the Board of Trade may be granted upon such Conditions and subject to such Regulations as the Board think fit to impose, and such Conditions and Regulations shall be binding on the Association, and may, at the Option of the said Board, be inserted in the Memorandum and Articles of Association, or in both or One of such Documents.

Calls upon Shares.

Company may have some Shares fully paid and others not.

XXIV. Nothing contained in the Principal Act shall be deemed to prevent any Company under that Act, if authorized by its Regulations as originally framed or as altered by special Resolution, from doing any One or more of the following Things, namely,—(1.) Making Arrangements on the Issue of Shares for a Difference between the Holders of such Shares in the Amount of Calls to be paid, and in the Time of Payment of such Calls: (2.) Accepting from any Member of the Company who assents thereto the whole or a Part of the Amount remaining unpaid on any Share or Shares held by him, either in discharge of the Amount of a Call payable in respect of any other Share or Shares held by him or without any Call having been made: (3.) Paying Dividend in proportion to the Amount paid up on each Share in Cases where a larger Amount is paid up on some Shares than on others.

Manner in which Shares are

XXV. Every Share in any Company shall be deemed and taken to have been issued and to be held subject to

the Payment of the whole Amount thereof in Cash, unless the same shall have been otherwise determined by a Contract duly made in Writing, and filed with the Registrar of Joint Stock Companies at or before the Issue of such Shares. to be issued and held.

Transfer of Shares.

XXVI. A Company shall on the Application of the Transferor of any Share or Interest in the Company enter in its Register of Members the Name of the Transferee of such Share or Interest, in the same Manner and subject to the same Conditions as if the Application for such Entry were made by the Transferee. Transfer may be registered at Request of Transferor.

Share Warrants to Bearer.

XXVII. In the Case of a Company limited by Shares the Company, if authorized so to do by its Regulations as originally framed, or as altered by special Resolution, and subject to the Provisions of such Regulations, may, with respect to any Share which is fully paid up, or with respect to Stock, issue under their Common Seal a warrant stating that the Bearer of the Warrant is entitled to the Share or Shares or Stock therein specified, and may provide, by Coupons or otherwise, for the Payment of the future Dividends on the Share or Shares or Stock included in such Warrant, herein-after referred to as a Share Warrant. Warrant of Limited Shares fully paid up may be issued in Name of Bearer.

XXVIII. A Share Warrant shall entitle the Bearer of such Warrant to the Shares or Stock specified in it, and such Shares or Stock may be transferred by the Delivery of the Share Warrant. Effect of Share Warrant.

XXIX. The Bearer of a Share Warrant shall, subject to the Regulations of the Company, be entitled, on surrendering such Warrant for Cancellation, to have his Name entered as a Member in the Register of Members, and the Company shall be responsible for any Loss incurred by any Person by Reason of the Company entering in its Register of Members the Name of any Bearer of a Share Warrant in respect of the Shares or Stock specified therein without the Share Warrant being surrendered and cancelled. Re-registration of Bearer of a Share Warrant in the Register.

XXX. The Bearer of a Share Warrant may, if the Regulations of the Company so provide, be deemed to be a Member of the Company within the Meaning of the Principal Act, either to the full Extent or for such Purposes as may be prescribed by the Regulations: Regulations of the Company may make the Bearer of a Share Warrant a Member.

Provided that the Bearer of a Share Warrant shall not be qualified in respect of the Shares or Stock specified in such Warrant for being a Director or Manager of the

Company in Cases where such a Qualification is prescribed by the Regulations of the Company.

Entries in Register where Share Warrant Issued.

XXXI. On the Issue of a Share Warrant in respect of any Share or Stock the Company shall strike out of its Register of Members the Name of the Member then entered therein as holding such Share or Stock as if he had ceased to be a Member, and shall enter in the Register the following Particulars:—(1.) The Fact of the Issue of the Warrant: (2.) A Statement of the Shares or Stock included in the Warrant, distinguishing each Share by its Number: (3.) The Date of the Issue of the Warrant: And until the Warrant is surrendered the above Particulars shall be deemed to be the Particulars which are required by the Twenty-fifth Section of the Principal Act to be entered in the Register of Members of a Company; and on the Surrender of a Warrant the Date of such Surrender shall be entered as if it were the Date at which a Person ceased to be a Member.

Particulars to be contained in annual Summary.

XXXII. After the Issue by the Company of a Share Warrant the annual Summary required by the Twenty-sixth Section of the Principal Act shall contain the following Particulars,—the total Amount of Shares or Stock for which Share Warrants are outstanding at the Date of the Summary, and the total Amount of Share Warrants which have been issued and surrendered respectively since the last Summary was made, and the Number of Shares or Amount of Stock comprised in each Warrant.

Stamps on Share Warrants.

XXXIII. There shall be charged on every Share Warrant a Stamp Duty of an Amount equal to Three Times the Amount of the *ad valorem* Stamp Duty which would be chargeable on a Deed transferring the Share or Shares or Stock specified in the Warrant, if the Consideration for the Transfer were the nominal Value of such Share or Shares or Stock.

Penalties on Persons committing Forgery.

XXXIV. Whosoever forges or alters, or offers, utters, disposes of, or puts off, knowing the same to be forged or altered, any Share Warrant or Coupon, or any Document purporting to be a Share Warrant or Coupon, issued in pursuance of this Act, or demands or endeavours to obtain or receive any Share or Interest of or in any Company under the Principal Act, or to receive any Dividend or Money payable in respect thereof, by virtue of any such forged or altered Share Warrant, Coupon, or Document, purporting as aforesaid, knowing the same to be forged or altered, with Intent in any of the Cases aforesaid to defraud, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Five Years, or to be imprisoned for any Term not exceeding

Two Years, with or without Hard Labour, and with or without Solitary Confinement.

Penalties on Persons falsely personating Owner of Shares.

XXXV. Whosoever falsely and deceitfully personates any Owner of any Share or Interest of or in any Company, or of any Share Warrant or Coupon issued in pursuance of this Act, and thereby obtain or endeavours to obtain any such Share or Interest, or Share Warrant or Coupon, or receives or endeavours to receive any Money due to any such Owner, as if such Offender were the true and lawful Owner, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for Life or for any Term not less than Five Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.

Penalties on Persons engraving Plates, &c.

XXXVI. Whosoever, without lawful Authority or Excuse, the Proof whereof shall be on the Party accused, engraves or makes upon any Plate, Wood, Stone, or other Material any Share Warrant or Coupon purporting to be a Share Warrant or Coupon issued or made by any particular Company under and in pursuance of this Act, or to be a blank Share Warrant or Coupon issued or made as aforesaid, or to be a Part of such a Share Warrant or Coupon, or uses any such Plate, Wood, Stone, or other Material for the making or printing any such Share Warrant or Coupon, or any such blank Share Warrant or Coupon, or any Part thereof respectively, or knowingly has in his Custody or Possession any such Plate, Wood, Stone, or other Material, shall be guilty of Felony, and being convicted thereof shall be liable, at the Discretion of the Court, to be kept in Penal Servitude for any Term not exceeding Fourteen Years and not less than Five Years, or to be imprisoned for any Term not exceeding Two Years, with or without Hard Labour, and with or without Solitary Confinement.

Contracts.

Contracts, how made

XXXVII. Contracts on behalf of any Company under the Principal Act may be made as follows; (that is to say) —(1.) Any Contract which if made between private Persons would be by Law required to be in Writing, and if made according to English Law to be under Seal, may be made on behalf of the Company in Writing under the Common Seal of the Company, and such Contract may be in the same manner varied or discharged: (2.) Any Contract which if made between private persons would be by Law required to be in Writing, and signed by the Parties to be charged therewith, may be made on behalf of the Company in Writing signed by any Person acting under

the express or implied Authority of the Company, and such Contract may in the same Manner be varied or discharged: (3.) Any Contract which if made between private Persons would by Law be valid although made by Parol only, and not reduced into Writing, may be made by Parol on behalf of the Company by any Person acting under the express or implied Authority of the Company, and such Contract may in the same Way be varied or discharged: And all Contracts made according to the Provisions herein contained shall be effectual in Law, and shall be binding upon the Company and their Successors and all other Parties thereto, their Heirs, Executors, or Administrators, as the Case may be.

Prospectus, &c. to specify Dates and Names of Parties to any Contract made prior to Issue of such Prospectus, &c.

XXXVIII. Every Prospectus of a Company, and every Notice inviting Persons to subscribe for Shares in any Joint Stock Company, shall specify the Dates and the Names of the Parties to any Contract entered into by the Company, or the Promoters, Directors, or Trustees thereof, before the Issue of such Prospectus or Notice, whether subject to Adoption by the Directors or the Company, or otherwise; and any Prospectus or Notice not specifying the same shall be deemed fraudulent on the Part of the Promoters, Directors, and Officers of the Company knowingly issuing the same, as regards any Person taking Shares in the Company on the Faith of such Prospectus, unless he shall have had Notice of such Contract.

Meetings.

Company to hold Meeting within Four Months after Registration.

XXXIX. Every Company formed under the Principal Act after the Commencement of this Act shall hold a General Meeting within Four Months after its Memorandum of Association is registered; and if such Meeting is not held the Company shall be liable to a Penalty not exceeding Five Pounds a Day for every Day after the Expiration of such Four Months until the Meeting is held; and every Director or Manager of the Company, and every Subscriber of the Memorandum of Association, who knowingly authorizes or permits such Default, shall be liable to the same Penalty.

Winding-up.

Contributory when not qualified to present Winding-up Petition.

XL. No Contributory of a Company under the Principal Act shall be capable of presenting a Petition for winding up such Company unless the Members of the Company are reduced in Number to less than Seven, or unless the Shares in respect of which he is a Contributory, or some of them, either were originally allotted to him or have been held by him, and registered in his Name, for a Period of at least Six Months during the Eighteen Months previously to the Commencement of the Winding-up, or have devolved

upon him through the Death of a former Holder: Provided that where a Share has during the whole or any Part of the Six Months been held by or registered in the Name of the Wife of a Contributory either before or after her Marriage, or by or in the Name of any Trustee or Trustees for such Wife or for the Contributory, such Share shall for the Purposes of this Section be deemed to have been held by and registered in the Name of the Contributory.

XLI. (Where the High Court of Chancery in *England* makes an Order for winding-up, it may, if it thinks fit, direct all subsequent Proceedings to be had in a County Court.)

XLII. (As to Transfer of Suit from one County Court to another.)

XLIII. (Parties aggrieved may appeal from decision of County Court Judge.)

XLIV. (Powers to frame Rules and Orders under Sect. 32 of 19 and 20 Vict., c. 108.)

XLV. (Scale of Costs to be framed by the Judges.)

XLVI. (Remuneration of Registrars and High Bailiffs in Winding-up of Companies.)

Saving.

XLVII. Nothing in this Act contained shall exempt any Company from the second or Third Provisions of the One hundred and ninety-sixth Section of the Principal Act restraining the Alteration of any Provision in any Act of Parliament or Charter.

Not to exempt Companies from Provisions of Sect. 196 of 25 & 26 Vict. c. 89.

CAP. CXLI.

An Act to amend the Statute Law as between Master and Servant. [20*th* August 1867.]

WHEREAS it is expedient to alter in some respects the existing Enactments relative to the Determination of Questions arising between Employers and Employed under Contracts of Service:

Be it therefore enacted by the Queen's most Excellent Majesty by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. This Act may be cited for all Purposes as "The Master and Servant Act, 1867." Short Title.

II. In this Act the following Words and Expressions Definition of Terms.

shall have the several Meanings hereby assigned to them, unless there be anything in the Subject or Context repugnant to such Construction: The Word "Employer" shall include any Person, Firm, Corporation, or Company who has entered into a Contract of Service with any Servant, Workman, Artificer, Labourer, Apprentice, or other Person, and the Steward, Agent, Bailiff, Foreman, Manager, or Factor of such Person, Firm, Corporation, or Company: The Word "Employed" shall include any Servant, Workman, Artificer, Labourer, Apprentice, or other Person, whether under the Age of Twenty-one Years or above that Age, who has entered into a Contract of Service with any Employer: The Words "Contract of Service" shall include any Contract, whether in Writing or by Parol, to serve for any Period of Time, or to execute any Work, and any Indenture or Contract of Apprenticeship, whether such Contract or Indenture has been or is made or executed before or after the passing of this Act: The Word "Parties" shall include the Employer and Employed under any Contract of Service: The Word "Writing" shall include "Printing:" The Word "Property" shall include all Real and Personal Estate and Effects used and employed under or affected by any Contract of Service or Operations under the same: The Word "Sheriff" applies to *Scotland* only, and shall include Sheriff-Substitute: The Words "County or Place" shall include County, Riding, Division, Liberty, City, Borough, or Place: The Word "Magistrate" does not apply to *Scotland*, and means in *England*, except in the City of *London*, a Stipendiary Magistrate, and in the City of *London* means the Lord Mayor or an Alderman sitting at the Mansion House or at the Guildhall, and in *Ireland* shall apply only to the Metropolitan Police District of *Dublin*, and there shall mean One of the Divisional Magistrates for such District: The Word "Justice" means Justice of the Peace: The Words "Two Justices" mean Two or more Justices assembled and acting together: The Words "Justice," "Two Justices," "Magistrate," and "Sheriff" respectively mean a Justice, Two Justices, a Magistrate, and a Sheriff having Jurisdiction in the County or Place where any Contract of Service is according to the Terms thereof to be executed, or where the Party against whom any Information, Complaint, or Proceeding is to be laid or taken under this Act happens to be.

Limitation of Scope of this Act, and Substitution thereof for

III. Nothing in this Act shall apply to any Contract of Service other than a Contract within the Meaning of the Enactments described in the First Schedule to this Act, or some or One of them, or to any Employer or Employed

other than the Parties to a Contract of Service to which this Act applies as aforesaid, or to any Case, Matter, or Thing arising under or relating to any Contract of Service, or arising between Employer and Employed, other than Cases, Matters, and Things to which the said Enactments respectively apply; and in respect of all Contracts of Service, Employers, Employed, Cases, Matters, and Things to which this Act applies, the respective Provisions of this Act shall be deemed to be and are hereby substituted for such of the said Enactments, or so much or such Parts of the same, as would have applied thereto if this Act had not been passed; but any Proceedings at the passing of this Act pending under the said Enactments, or any of them, may be continued and prosecuted as if this Act had not been passed. existing Enactments.

IV. Wherever the Employer or Employed shall neglect or refuse to fulfil any Contract of Service, or the Employed shall neglect or refuse to enter or commence his Service according to the Contract, or shall absent himself from his Service, or wherever any Question, Difference, or Dispute shall arise as to the Rights or Liabilities of either of the Parties, or touching any Misusage, Misdemeanor, Misconduct, Ill-treatment, or Injury to the Person or Property of either of the Parties under any Contract of Service, the Party feeling aggrieved may lay an Information or Complaint in Writing before a Justice, Magistrate, or Sheriff, setting forth the Grounds of Complaint, and the Amount of Compensation, Damage, or other Remedy claimed for the Breach or Nonperformance of such Contract, or for any such Misusage, Misdemeanor, Misconduct, Ill-treatment, or Injury to the Person or Property of the Party so complaining; and upon such Information or Complaint being laid, the Justice, Magistrate, or Sheriff shall issue or cause to be issued a Summons or Citation to the Party so complained against, setting out the Grounds of Complaint, and the Amount claimed for Compensation, Damage, or other Remedy, as set forth in the said Information or Complaint, and requiring such Party to appear, at the Time and Place therein appointed, before Two Justices or before a Magistrate, or before the Sheriff, to answer the Matter of the Information or Complaint, so that the same may be then and there heard and determined. Complaint to be made before a Justice or Magistrate in England, Wales, and Ireland, and before a Justice or Sheriff in Scotland. Upon Complaint made, Summons or Citation to be issued.

V. The Time to be appointed in the Summons or Citation for the Appearance of the Party complained against shall not be less than Two or more than Eight Days from the Date of the Summons or Citation, save that where the Appearance is to be before Justices in Petty Sessions, or before a Magistrate at a Police Court, the Time Time for Appearance.

to be appointed shall be that of the Sitting of the Court of Petty Sessions or Police Court at or for the Place where the Summons or Citation is returnable, to be held next after such Two Days (whether within such Eight Days or not).

Mode and Time of Service.

VI. Every such Summons or Citation shall be served on the Party complained against by being delivered to him or left at his usual Place of Abode or Business not less than Two Days before the Time appointed for his Appearance.

On Neglect or Refusal to obey Summons or Citation, Warrant to issue.

VII. Wherever the Party complained against shall neglect or refuse to appear to any Summons or Citation as aforesaid according to the Provisions of this Act, a Justice, Magistrate, or Sheriff may, after due Proof on Oath of the Service of such Summons or Citation, issue a Warrant for the Apprehension of such Party in order to the hearing and determining of the Matter of the Information or Complaint.

In case of Intention to abscond, Security to be found for Appearance.

VIII. If at any Time after the laying of the Information or Complaint it appears to a Justice, Magistrate, or Sheriff that the Party complained against is about to abscond, the Justice, Magistrate, or Sheriff may issue a Summons or Citation requiring the Party complained against to appear before a Justice, Magistrate, or Sheriff at a Time and Place therein appointed (such Time being not later than Twenty-four Hours, exclusive of *Sunday*, from the Date of the last-mentioned Summons or Citation), and to find good and sufficient Security by Recognizance or Bond, with or without Sureties, to the Satisfaction of a Justice, Magistrate, or Sheriff, for his Appearance to answer the Information or Complaint; and if the Party complained against fails to appear at the Time and Place so appointed, a Justice, Magistrate or Sheriff may issue a Warrant for his Apprehension; and if such Party on appearing to the last-mentioned Summons or Citation, or on being so apprehended, fails so to find Security, a Justice, Magistrate, or Sheriff may order him to be detained in safe Custody until the hearing of the Information or Complaint; but on his so finding Security he shall be set at liberty.

Compensation may be awarded under Order of Two Justices, &c., for Breach, or Nonperformance of Contract of Service, or

IX. Upon the Hearing of any Information or Complaint under the Provisions of this Act Two Justices, or the Magistrate or Sheriff, after due Examination, and upon the Proof and Establishment of the Matter of such Information or Complaint, by an Order in Writing under their respective Hands, in their or his Discretion, as the Justice of the Case requires, either shall make an Abatement of the whole or Part of any Wages then already due to the Employed, or else shall direct the Fulfilment of the Con-

tract of Service, with a Direction to the Party complained against to find forthwith good and sufficient Security, by Recognizance or Bond, with or without Sureties, to the Satisfaction of a Justice, Magistrate, or Sheriff, for the Fulfilment of such Contract, or else shall annul the Contract, discharging the Parties from the same, and apportioning the Amount of Wages due up to the completed Period of such Contract, or else where no Amount of Compensation or Damage can be assessed, or where pecuniary Compensation will not in the Opinion of the Justice, Magistrate, or Sheriff meet the Circumstances of the Case, shall impose a fine upon the Party complained against, not exceeding in Amount the Sum of Twenty Pounds, or else shall assess and determine the Amount of Compensation or Damage, together with the Costs, to be made to the Party complaining, inclusive of the Amount of any Wages abated, and direct the same to be paid accordingly; and if the Order shall direct the fulfilment of the Contract, and direct the Party complained against to find good and sufficient Security as aforesaid, and the Party complained against neglect or refuse to comply with such Order, a Justice, Magistrate, or Sheriff may, if he shall think fit, by Warrant under his Hand, commit such Party to the Common Gaol or House of Correction within his Jurisdiction, there to be confined and kept until he shall so find Security, but nevertheless so that the Term of Imprisonment, whether under One or several successive Committals, shall not exceed in the whole the Period of Three Months: Provided always, that the Two Justices, Magistrate, or Sheriff may, if they or he think fit, assess and determine the Amount of Compensation or Damage to be paid to the Party complaining, and direct the same to be paid, whether the Contract is ordered by them or him to be annulled or not, or, in addition to the annulling of the Contract of Service and Discharge of the Parties from the same, may, if they or he think fit, impose the Fine as herein-before authorized, but they or he shall not under the Powers of this Act be authorized to annul, nor shall any Provisions of this Act have the Effect of annulling, any Indenture or Contract of Apprenticeship that they or he might not have annulled or that would not have been annulled if this Act had not been passed.

other Order may be made.

X. Where it is alleged by any Party to a Contract of Service that the Condition of a Recognizance or Bond entered into or given for the Fulfilment of the Contract under the Provisions of this Act has not been performed, Two Justices, or a Magistrate or Sheriff, being satisfied thereof, after hearing the Parties and the Sureties (if any), or in the Absence of any Party or Surety not appearing after

Enforcement of Recognizance or Bond for Fulfilment of Contract.

Summons or Citation in that behalf, may order that the Recognizance or Bond be enforced for the whole or Part of the Sum thereby secured, as to the Justices, Magistrate, or Sheriff seems fit; and the Sum for which the same is so ordered to be enforced shall be recoverable accordingly in a summary Manner under the Acts described in the Second Shedule to this Act.

Recovery of Money by Distress or Poinding, and Imprisonment in default.

XI. Where on the Hearing of an Information or Complaint under this Act an Order is made for the Payment of Money, and the same is not paid as directed, the same shall be recovered by Distress or Poinding of the Goods and Chattels of the Party failing to pay, and in default thereof by Imprisonment of such Party, according and subject to the Acts described in the Second Schedule to this Act; but no such Imprisonment shall be for more than Three Months, or be with Hard Labour.

Imprisonment to be in discharge of Compensation.

XII. From and after the Expiration of the Term of any such Imprisonment as aforesaid, the Amount of Fine, Compensation, or Damages, together with the Costs, so assessed and directed to be paid by any such Order as aforesaid, shall be deemed and considered as liquidated and discharged, and such order shall be annulled accordingly, and the said Parties exonerated from their respective Obligations under the same: Provided always, that no Wages or any Portion thereof which may be accruing due to the Employed under any Contract of Service after the Date of such Order shall be assessed to the Amount of Compensation or Damages and Costs directed to be paid by him under any such Order or Warrant of Distress or Poinding, or be seizable or arrestable under the same

Wages exempt from Order, Distraint, Poinding, or Arrestment.

Application of Fines and Money recovered.

XIII. Where Justices, or a Magistrate or Sheriff, impose any Fine or enforce any Sum secured by a Recognizance or Bond under this Act, they or he may, if they or he think fit, direct that a Part, not exceeding One Half, of such Fine or Sum, when recovered, be applied to compensate an Employer or Employed for any Wrong or Damage sustained by him by reason of the Act or Thing in respect of which the Fine was imposed, or by reason of the Nonfulfilment of the Contract of Service.

Punishment for aggravated Misconduct, &c.

XIV. Where on the Hearing of an Information or Complaint under this Act it appears to the Justices, Magistrate or Sheriff that any Injury inflicted on the Person or Property of the Party complaining, or the Misconduct, Misdemeanour, or Ill-treatment complained of, has been of an aggravated Character, and that such Injury, Misconduct, Misdemeanour, or Ill-treatment has not arisen or ben committed in the *bonâ fide* Exercise of a legal Right, existing, or *bonâ fide* and reasonably supposed to exist and further, that any pecuniary Compensation or other

Remedy by this Act provided will not meet the Circumstances of the Case, then the Justices, Magistrate, or Sheriff may, by Warrant, commit the Party complained against to the Common Gaol or House of Correction within their or his Jurisdiction, there to be (in the Discretion of the Justices, Magistrate, or Sheriff,) imprisoned, with or without Hard Labour, for any Term not exceeding Three Months.

Party convicted may appeal to the next General Quarter Sessions of the Peace.

XV. Any Party convicted by Two Justices or the Magistrate under the Provisions of the last preceding Section may appeal against the Conviction upon finding good and sufficient Security, by Recognizance or Bond, with or without Sureties, to the Satisfaction of a Justice or Magistrate, to prosecute the said Appeal at the next General Court of Quarter Sessions of the Peace to be holden in and for the County or Place wherein such Conviction shall have been made, and to abide the Result of the said Appeal according to the usual Procedure of such Court, and to pay such Costs as that Court may direct, which Costs that Court is hereby empowered to award.

Parties to the Contract of Service to be competent Witnesses.

XVI. Upon the hearing and determination of any Information or Complaint between Employer and Employed, and on any Appeal, under the Provisions of this Act, the respective Parties to the Contract of Service, their Husbands or Wives, shall be deemed and considered as competent Witnesses for all the Purposes of this Act.

Wages not to be payable during Imprisonment.

XVII. No Wages shall become payable to or recoverable by any Party for or during the Term of his Imprisonment under any Warrant of Committal under this Act.

Nothing to prevent Proceedings by Civil Action or Suit.

XVIII. Nothing in this Act shall prevent Employer or Employed from enforcing their respective Civil Rights and Remedies for any Breach or Nonperformance of the Contract of Service by any Action or Suit in the ordinary Courts of Law or Equity in any Case where Proceedings are not instituted under this Act; nor shall anything in this Act affect the Provisions of the Act of the Fifth Year of King *George* the Fourth (Chapter Ninety-six), "to consolidate "and amend the Laws relative to the Arbitration of Dis- "putes between Masters and Workmen," or of any Act extending or amending the same.

5 Geo. 4, c. 96.

Saving for Indictments, &c.

XIX. Nothing in this Act shall interfere with the usual and accustomed Mode of Procedure in any Court of Criminal Judicature for the Trial of indictable Offences relating to wilful and malicious Injuries to Persons or Property committed by Masters, Workmen, Servants, or others, either at Common Law or under the several Statutes made and now in force for the Punishment of such Offences, but so that no Person be twice prosecuted for the same Offence.

No Objection to be taken for Defect in Forms.

XX. The several Forms in the Third Schedule to this Act contained, or Forms to the like Effect, shall be deemed valid and sufficient in Law, and no Objection shall be taken or allowed for any alleged Defect therein, either in Substance or in Form, and in *Scotland* any Complaint under the Provisions of this Act, if brought before the Sheriff, may be in the Form of a summary Petition, and followed by the usual Forms of Procedure applicable to summary Petitions in the Sheriff Court; and the Forms set forth in the Third Schedule (Part 2.—*Scotland*) to this Act Annexed, or Forms to the like Effect, may be used, and shall be sufficient for the Purposes thereof.

Application of summary Procedure Acts.

XXI. The Enactments described in the Second Schedule to this Act, and all enactments extending or amending the same, shall apply and be put in force to and in respect of Proceedings under this Act, except as far as any Provision of this Act is inconsistent therewith.

XXII. Except as in this Act expressly otherwise provided, every Order or determination of a Justice, Justices, a Magistrate, or a Sheriff, shall be final and conclusive, notwithstanding anything in any of the Enactments described in the First Schedule to this Act. 23. No Writ of Certiorari or other Process shall issue to remove any Proceedings under this Act into any Superior Court. 24. Nothing in this Act shall take away or abridge any local or special Jurisdiction touching Apprentices. 25. Nothing in this Act shall extend or make applicable to or in *Ireland*, or to or in any Part of *Great Britain*, any of the Enactments described in the First Schedule to this Act not in force there independently of this Act. 26. This Act shall continue in force until the Expiration of One Year after the passing thereof, and to the End of the then next Session of Parliament, and no longer.

SCHEDULES.

THE FIRST SCHEDULE.

Enactments referred to.

7 Geo. 1 Stat. 1, c. 13, ss. 4, 6.—As to Journeymen Taylors. 9 Geo. 1, c. 27, s. 4.—As to Journeyman Shoemakers. 13 Geo., c. 2

8, ss. 7, 8.—As to Woollen, Linen, Fustian, Cotton, Leather, and Iron Manufactures. 20 Geo. 2, c. 19.—For Recovery of Wages, &c. 27 Geo. 2, c. 6.—Stannaries in Devon and Cornwall. 31 Geo. 2, c. 11, s. 3.—Apprentices gaining a Settlement by Indenture, &c. 6 Geo. 3, c. 25.—Apprentices, and Persons working under Contract. 17 Geo. 3. c. 56, ss. 8, 19.—Manufacture of Hats, and Woollen, Linen, Fustian, Cotton, Iron, Leather, Fur, Hemp, Flax, Mohair, and Silk Manufactures; also Journeymen Dyers. 33 Geo. 3, c. 55, ss. 1, 2.—Constables, Overseers, and other Peace or Parish Officers, and Ill-usage of Apprentices, &c. 39 & 40 Geo. 3, c. 77, s. 3.—Security of Collieries and Mines, &c. 59 Geo. 3, c. 92, ss. 5, 6.—Justices of Peace in Ireland. 4 Geo. 4, c. 29.—An Act to increase the power of Magistrates in Cases of Apprenticeships. 4 Geo. 4, c. 34.—An Act to enlarge the Powers of Justices in determining Complaints between Masters and Servants, and between Masters, Apprentices, Artificers, and others. 10 Geo. 4, c. 52.—An Act to extend the Powers of an Act of the Fourth Year of His present Majesty for enlarging the Powers of Justices in determining Complaints between Masters and Servants to Persons engaged in the Manufacture of Silk. 5 & 6 Vict., c. 7.—An Act to explain the Acts for the better Regulation of certain Apprentices. 6 & 7 Vict., c. 40, s. 7.—An Act to amend the Laws for the Prevention of Frauds and Abuses by Persons employed in the Woollen, Worsted, Linen, Cotton, Flax, Mohair, and Silk Hosiery Manufactures; and for the further securing the Property of the Manufacturers and the Wages of the Workmen engaged therein. 14 & 15 Vict., c. 92, s. 16.—The Summary Jurisdiction (Ireland) Act, 1851.

THE SECOND SCHEDULE.

Summary Procedure Acts applied.

England.

11 & 12 Vict. c. 43. 28 & 29 Vict., c. 127.—The Small Penalties Act, 1865.

Scotland.

27 & 28 Vict. c. 53.—The Summary Procedure Act, 1864.

Ireland.

14 & 15 Vict., c. 93.—The Petty Sessions (Ireland) Act, 1851.

THE THIRD SCHEDULE.

Forms.

[A. and C. not applicable to Scotland.]

PART I.—ENGLAND AND IRELAND.

B.

Statements of the Matters or Grounds of Complaint for Insertion in the ordinary General Forms in Use by Justices.

(a.) *Neglecting to fulfil Contract.*—That *A.B.* of (hereafter called the said Employed) being the Servant [*or* Workman, *or* Artificer, *or* Labourer, *or* Apprentice] of the said *C.D.* of (hereafter called the said Employer) in his Trade or Business of a , under a certain Contract of Service [*or* Apprenticeship] for a Period now unexpired, [*or* to execute certain Work, namely, ,]* did on the Day of at in the said County, unlawfully neglect [*or* refuse], and has ever since neglected [*or* refused] to fulfil the said Contract [*or* to enter into *or* commence his Service according to the said Contract, *or* Apprenticeship, *or* has absented himself from the Service of the said Employer without just Cause or lawful Excuse]. [*Conclude as in Statement (e.) below.*]

(b.) *Dispute as to Rights.—Proceed to the Asterisk * in (a.), and then:* and that a certain Question, Difference, and Dispute has arisen between them as to the Right [*or* Liability of the said Employed [*or* Employer] under the said Contract, namely, [*stating it*], which the said Employed [*or* Employer] claims should, *&c.* [*as the Fact is.*] [*Conclusion as (e.) below.*]

(c.) *Disputes as to Mis-usage, Misdemeanor, Misconduct, or Ill-treatment of either Party.—Proceed to the Asterisk * in (a.), and then:* and that a certain Question, Difference, and Dispute has arisen between them touching certain Ill-usage which the said Employed [*or* Employer] committed [*or* inflicted upon the said Employer [*or* Employed]; [*or* touching a certain Misdemeanor which the said Employer committed], [*or* touching certain Misconduct which the said Employed was guilty of], [*or* touching certain Ill-treatment which the said Employed *or* Employer inflicted upon the said Employer *or* Employed], on the Day of at in

the said County, namely, that he, the said [*setting it out shortly*]. [*Conclusion as* (*e.*) *below*].

(*d.*) *Dispute as to Injury to Person or Property of either Party.—Proceed to the Asterisk* * *in* (*a.*), *and then:* and that a certain Question, Difference, and Dispute has arisen between them touching a certain Injury which the said Employed [*or* Employer] inflicted to the Person of the said Employer [*or* Employed], [*or* to the Property of the said Employer *or* Employed], on the Day of at the Parish of in the said County. [*Conclusion as in* (*e.*) *below*].

(*e.*) *Conclusion to either of the Forms* (*a.*) (*b.*) (*c.*) *and* (*d.*)—And the said Complainant, the Employer [*or* Employed] further says that the Amount of Compensation [*or* Damage] which he claims for the said Breach and Nonperformance of the said Contract [*or* for the said Mis-usage, *or* Misdemeanor, *or* Misconduct, *or* Ill-treatment, *or* Injury, *as the Case may be,*] is £ , and he prays that the said Employed [*or* Employer] may be summoned and adjudicated upon under Section of The Master and Servant Act, 1867.

Part 2.—Scotland.

Forms of Procedure before the Sheriff in Scotland.

I.

Complaint.

Under The Master and Servant Act, 1867.

Unto the Sheriff.

A.B. [*describe Place of Abode and Trade.*]

against

C.D. [*describe Place of Abode and Trade.*]

The Complainer humbly showeth—

That the said *C.D.* [*here state the Matter of the Complaint, and the Amount claimed for Damages, as in Forms of Statements in Part* 1. (B.)]

May it therefore please your Lordship to grant Warrant to cite the said *C.D.*, Respondent, to appear before you to answer to this Complaint, and thereafter to proceed in the Matter in Terms of the said Act.

According to Justice,

A.B. [*Signature of Complainer.*]

2.

Warrant for Citation of Respondent.

The Sheriff grants Warrant to Officers of Court to serve a Copy of the foregoing Complaint and of this Deliverance upon *C.D.*, Respondent, and to cite him to appear personally to answer thereto at [*Court House or Place*] upon the Day of at Noon, with Certification, and also to cite Witnesses and Havers for both Parties for all Diets in the Cause.

[*Signature of Sheriff.*]

3.

Form of Citation.

To *C.D.* [*Designation.*]

Take notice that you are cited to appear personally at the Time and Place specified in the Warrant of Citation to answer the Complaint attached, in respect of which said Warrant is issued with Certification.

This I do on the Day of

[*Signature of Officer.*]

4.

Form of Execution of Complaint.

This Complaint served by me, Sheriff Officer, upon *C.D.*, Respondent [*state whether personally or otherwise*], in Presence of [*state Name and Designation of Witness*], this Day of Eighteen hundred and Years.

E.F., *Sheriff Officer.*

L. M., *Witness.*

CAP. CXLIII.

An Act to continue various expiring Laws.
20th August 1867.]

[Continues, *inter alia*, 4 and 5 Vict. c. 30, and Amending Act 19 and 20 Vict. c. 61, as to the Survey of Great Britain, in 31st Dec. 1869, and end of then next Session; 26 and 27

Vict. c. 105, removing restrictions on the negotiation of bills of exchange and promissory notes, under a limited sum, till 28th July 1868, and end of then next session; 28 and 29 Vict. c. 36, Militia Ballots Suspension Act, till 1st Oct. 1868, and end of then next session; 28 and 29 Vict. c. 83, for regulating the use of Locomotives on Turnpike Roads, till 1st Sept. 1868, and end of then next session; 29 and 30 Vict. c. 121, for amendment of the law relating to Treaties of Extradition, till 1st Sept. 1868, and end of then next session.]

INDEX OF STATUTES.